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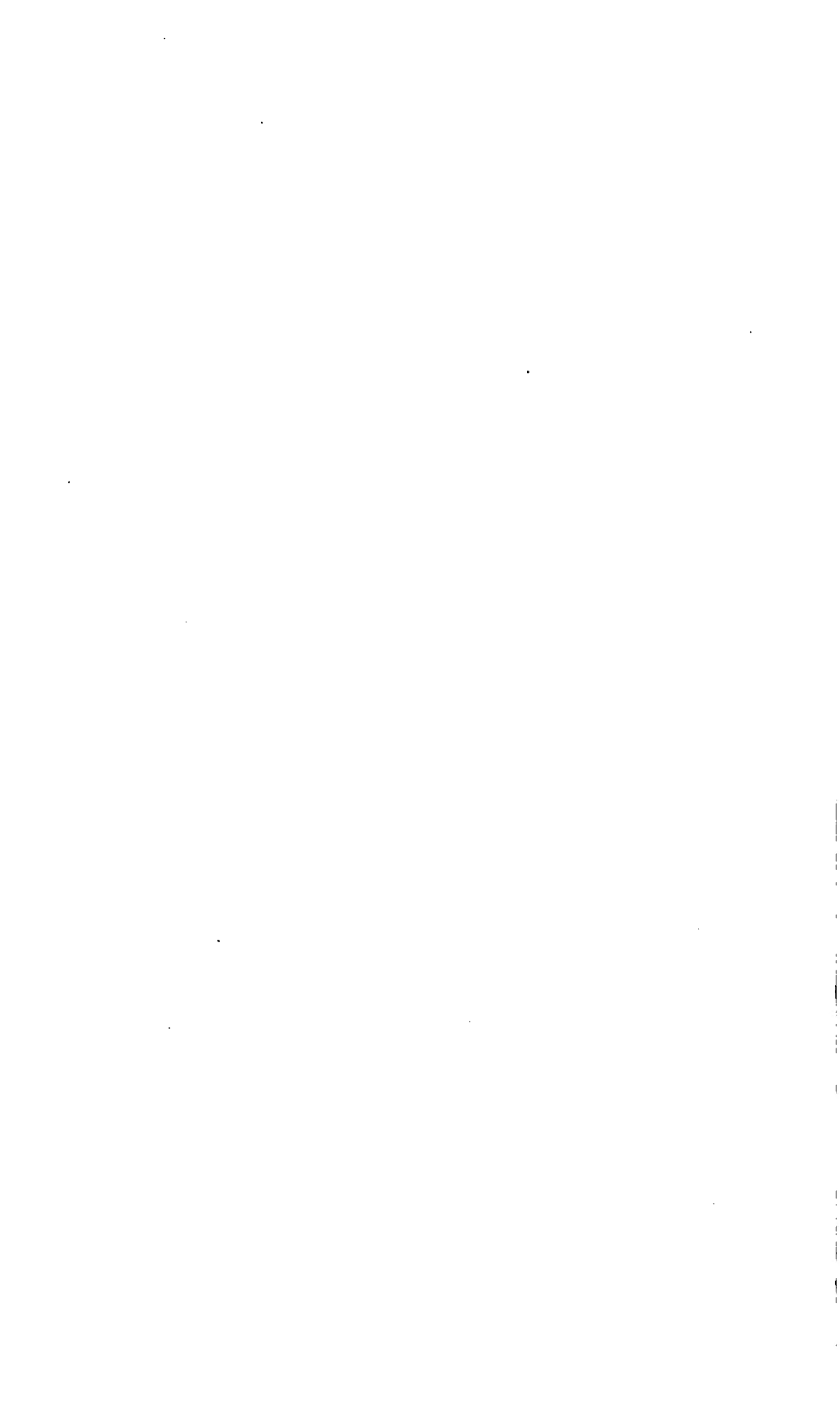


Suppl. 1892

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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Court of Common Pleas,
AND
OTHER COURTS,
With Tables of the Cases and Principal Matters.

By PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. IV.
FROM MICHAELMAS TERM, 7 GEO. IV. 1826, TO
EASTER TERM, 9 GEO. IV. 1828,
BOTH INCLUSIVE.

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OF THE
COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

The Right Hon. Sir WILLIAM DRAPER BEST, Knt.
Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir STEPHEN GASELEE, Knt.

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UNRECORDED

1826.

CASES
ARGUED AND DETERMINED
IN THE
Court of COMMON PLEAS,
AND
OTHER COURTS,
IN
Michaelmas Term,
In the Seventh Year of the Reign of GEORGE IV.

MEMORANDA.

IN the course of the last vacation the Right Honourable Lord *Gifford*, Master of the Rolls, died. He was succeeded by Sir *John Singleton Copley*, Knight, his Majesty's Attorney-General.

Sir *Charles Wetherell*, Knight, his Majesty's Solicitor-General, succeeded to the office of Attorney-General and *Nicholas Conyngham Tindal*, of *Lincoln's Inn*, Esquire, succeeded to that of Solicitor-General, and was afterwards knighted.

1826.

Nov. 7.

DANCER v. HASTINGS.

Cognizance for rent arrear under a demise from *W.* It appeared by the lease, that *W.* was a receiver in Chancery, "in a cause wherein *A.* was Plaintiff and *B.* Defendant;" the redendum was to *W.* or any future receiver:

Held, that the lessee could not plead non tenuit.

REPLEVIN. Cognisance by Defendant as bailiff to *R. Walker*, for rent arrear on a demise from *Walker*. Plea, *non tenuit*, and issue thereon.

At the trial before *Burrough J.*, last *Hereford* assizes, the demise appeared by the lease to be from *R. Walker*, a receiver appointed by Chancery (in a cause wherein *A. B.* was plaintiff and *C. D.* defendant,) to the Plaintiff in this action, for a term of fourteen years, he paying to *Walker*, or any future receiver, the sum of 20*l.* per annum.

A verdict having been found for the Defendant,

Peake, Serjt. moved for a rule *nisi* to set it aside, on the ground that the nature of the lessor's title appearing upon the lease, the bailiff ought to have made cognisance under the persons beneficially interested in the property, and not under the mere receiver. The lessee held of the person beneficially entitled, and though the receiver might demise, he could only do so for the benefit of the owner. If the receiver might have sued on a covenant made to him, at all events he could not distrain, for he had no reversion; but there was no instance in which a receiver had been a plaintiff.

The Court, however, were clear that the Plaintiff could not take a lease from *Walker*, and then turn round and say that *Walker* had not demised; and *Gaselee J.* observed, that probably it was not decided who was interested in the property, so that if the receiver were excluded, there would be no one who could distrain.

Rule refused.

1826.

COURTENAY v. FISHER and Another.

Nov. 9.

TRESPASS for cutting down and carrying away Plaintiff's oak tree.

Plea, that the lands on which the tree stood were part of a tenement demised by indenture for ninety-nine years, in 1782, by *A. M. Throckmorton* to *Samuel Fisher*, trees excepted, with a proviso that if the said *Samuel Fisher*, his executors, administrators, or assigns, should permit the demised premises to be in decay for want of reparations, he having towards such repairs sufficient house-bote, gate-bote, and bar-bote, by delivery of the known steward or bailiff for the time being of the said manor, and not otherwise, the same to be spent on the premises, and not elsewhere, and without waste or spoil, the said indenture should be void, and the term thereby granted determine: that the term was afterwards, on the death of *S. Fisher*, vested in *Matthew Fisher*, and continued so at the time of the supposed trespass: that during his possession a barn and some outhouses being in want of repair, one *Anthony Bowden*, being at the time of the supposed trespass, and at the time next thereafter mentioned, the known bailiff of the manor, did on the 10th of *April* 1823, assign, point out, and deliver to the Defendant *Matthew Fisher* the tree mentioned in the declaration, then growing and being upon the demised premises; whereupon Defendants, as his servants, cut it down for the purpose of using it in the repairs mentioned.

Replication, *de injuriâ*, and issue thereon.

At the trial before *Littledale J.*, last *Devon* assizes, it appeared that the tree, though assigned in *April* 1823 by

Where the bailiff of a manor assigned to a tenant in *April*, pursuant to the terms of a lease, a tree for house-bote; the bailiff was discharged in *July*, and the tenant cut down the tree in *October*: Held, sufficient delivery, and that the tenant was entitled to fell the tree in *October*.

1826.
 {
 COURTENAY
 v.
 FISHER.

Bowden for the reparations mentioned in the plea, and marked for the purpose of being cut down, was not cut down till *October*. It appeared also that *Bowden* was in the meantime discharged for misconduct.

An attempt to show that the assignment was fraudulent, failed, and *Littledale J.* left it to the jury to say whether there had been a sufficient delivery according to the custom of the country. The jury found in the affirmative, and gave a verdict for the Defendant; whereupon

Taddy Serjt. moved for a rule *nisi* to enter up judgment for the Plaintiff, *non obstante veredicto*, on the ground that the tree not having been felled at the time it was assigned, there was no delivery of it by the bailiff. The custom of the country could not regulate the construction of deeds, and delivery could only be predicated of a chattel. The bailiff ought to have caused the tree to have been cut down, and then to have delivered it. But even if this were a delivery, it could not operate to excuse the tenant, unless he cut down the tree immediately afterwards; had he cut it down in the spring, when the sap rises, the landlord would have been enabled to strip off and dispose of the bark, which could not be applied to repairs. By postponing the fall till *October*, the tenant deprived the landlord of this advantage.

BEST C. J. No authority has been adduced to show that there was not a sufficient delivery of this tree.

There was an assignment of the tree by the bailiff; a permission to fell; and that excuses the tenant from any action on the part of the landlord.

It was not necessary for him to cut the tree down immediately after the assignment; he might cut it at any subsequent time, unless countermanded.

The

The supposed injury to the landlord by being deprived of the bark, might perhaps entitle him to a cross action, but does not enable him to sue the tenant as a trespasser.

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PARK J. The lease contains an express provision for the bailiff to deliver trees for house-bote.

When he had once pointed out and assigned a tree for that purpose, the lord should have countermanded the licence if he proposed that the tenant should not act upon it. There was a sufficient delivery, and the tenant was entitled to act on it.

BURROUGH J. There was a clear delivery. This is a shameful action.

GASELEE J. The delivery was the only delivery possible, for the lord could not enter on the tenant's land to fell the tree himself, without being a trespasser.

Rule refused.

KEMPSON v. SAUNDERS.

Nov. 10.

THIS was an action for money had and received, brought under the following circumstances, which appeared in evidence at the trial before *Best C.J.*, *London* sittings after *Trinity* term last.

The Defendant had sold to the Plaintiff at *3l. 5s.* premium, twenty shares in a projected company for constructing a rail-road from *Birmingham* to *Bristol*,

A. having sold *B.* shares in a projected joint stock company, and the undertaking having been abandoned before any thing was done pursuant to

the project : Held, that *B.* might recover from *A.* the money paid for the shares

B 3

upon

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 KEMPSON
 v.
 SAUNDERS.

upon each of which shares a deposit of 2*l*. had been paid by the original holder, of whom they had been purchased by the Defendant. The committee who had framed the project and issued the scrip, agreed that nothing should be done till the sanction of the legislature was obtained; they afterwards abandoned the project, and no act of parliament for incorporating the company was ever obtained.

Upon the failure of the scheme, the Plaintiff sought to recover from the Defendant the money he had paid him on account of the twenty shares in the projected undertaking.

A verdict was found for the amount, on the ground that the consideration for the payment had failed; but leave having been given to the Defendant to move,

Vaughan Serjt. now moved to set it aside on the ground that the whole transaction being illegal, and the parties in *pari delicto*, one of them could not sue the other; *Jaques v. Withy*. (a)

It was true that in *Nockells v. Crosby* (b), a party who had contributed to a proposed tontine scheme, was, on the abandonment of the project, allowed to recover his contribution from the director; but it was holden that the tontine scheme was not within the bubble act 6 G. 1. c. 18., whereas the present project was an undertaking directly within the provisions of that act, and the question might be decided on the principle laid down in *Houison v. Hancock* (c), where it was holden that the loser could not recover of the winner money paid with the consent of the loser, by the stakeholder, on an illegal wager.

BEST C. J. I entertain the same opinion now as I expressed at the trial. The case is one of great import-

(a) 1 T. R. 157. 1 H. Bl. 65. (c) 8 T. R. 575.

(b) 3 B. & C. 814.

ance. If the transaction in which the Plaintiff engaged had been illegal, he could not have recovered this demand; the law on that head is clear, and most beneficial in its consequences; but although the 6 G. 1. c. 18. renders illegal, societies of the kind projected in this instance, there was nothing illegal in the transaction in which the Plaintiff was concerned, because at the meeting convened for the purpose of framing the project, it was agreed that nothing should be done till the sanction of the legislature was obtained. While things were in this state, the Defendant, who was not an original subscriber, but had purchased these shares, (which in fact were not saleable till the company was formed,) sold them to the Plaintiff: but he sold a nothing, — an alleged title, of no value. If he bought of another, he may sue the seller, and the seller the party from whom he purchased, till at last we come to the original projectors, and in getting at them a great service will be done.

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The rest of the Court concurring, the rule was
Refused.

1826.

(IN THE EXCHEQUER CHAMBER.)

Nov. 13.

VINES v. Mayor of READING and Others.

Action for toll traverse: evidence that the Defendant on a market-day sold forty-one quarters of corn by two sacks pitched in the market: Held, not sufficient to authorise a verdict against him.

ERROR. The Plaintiffs below declared in their third count, (on which, and on the fourth and thirtieth only, a verdict was taken,) that the Defendant below was indebted to the said Plaintiffs in divers, to wit, 500 quarts of wheat, 500 quarts of barley, 500 quarts of oats, 500 quarts of tares, 500 quarts of beans, 500 quarts of peas of great value, to wit, of the value of 20*l.*, due and of right payable and renderable by the said Defendant to the said Plaintiffs as and for certain tolls of wheat, barley, oats, tares, beans, and peas by the said Defendant before that time *brought into the Borough of Reading, and there sold and disposed of*, whereby, and by reason of the said tolls being and remaining wholly unpaid and unreduced, an action hath accrued to the said Plaintiffs, to demand and have of and from the said Defendant the same tolls. The fourth count was the same, substituting only the word *market* for *borough*, and the thirtieth count was in *detinue* for detaining like quantities of grain, the property of the Plaintiffs below. At the trial before *Abbott C. J. Reading Spring assizes 1826*, after the evidence adduced to establish the right of the Plaintiffs below to toll, the only evidence that the Defendant below had brought into the borough or market of *Reading*, and there sold or disposed of corn, was as follows: *George Newbar*, a witness called by the Plaintiffs below, stated that on the 31st of *October 1818* the Defendant below sold to *Benjamin Chapman* 41 quarters and a half of wheat in the market-place,

place, on a market day, *by two sacks* pitched in the market.

The Lord Chief Justice in his charge to the Jury, confined his observations to the evidence adduced to establish the general right of the Plaintiffs below to toll, without commenting on the evidence which had been adduced to show that the Defendant below had rendered himself liable to that toll; and he told the Jury, that if they should be of opinion that the toll was taken before the time of legal memory, and that the soil of the borough was in the hands of the Abbot of *Reading* before the time of legal memory, there was sufficient to warrant them in finding the toll to be a toll traverse, as referable to the ownership of the soil and the burthens attaching to that ownership, of reparations of the bridges and the market-place, and that they ought to find their verdict for the Plaintiffs below. A verdict was accordingly found for the Plaintiffs below. Whereupon a bill of exceptions having been tendered and sealed, one of the errors assigned was, "That there was not sufficient evidence whereon the said jury could or ought to find a verdict for the said Plaintiffs, nor was there sufficient evidence to entitle the said Plaintiffs to a verdict on the third, fourth, and thirtieth counts of the declaration."

This bill of exceptions was argued in *Trinity* term last, when a question was raised, whether or not the Defendant below could, in this Court, make any other objections on matters apparent on the face of the record, besides the objections specified in the exceptions.

The case stood over to this term, when the question was again raised. But the Court having suggested, that admitting the right to demand toll to be established, there was no evidence on the record to show that the Defendant had brought wheat into the borough or market, so as to render himself liable to payment of toll; no opinion was given on the other point.

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VINES

v.

Mayor of
READING.*Jervis*

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VINES

v.

Mayor of
READING.

Jervis having been heard for the Defendant below, and having relied on the defect of evidence as applicable to him,

R. Bayly for the Plaintiffs below, contended that there was sufficient evidence to justify a verdict against the Defendant below. It appeared that he sold by two sacks, and not by a pocket sample, so that probably those two sacks formed part of the quantity sold, and they were certainly pitched in the market. But

The Court after observing that the objection now urged fell clearly within the exception on record, "that there was not sufficient evidence on which the jury could find a verdict for the Plaintiffs," said, it did not appear that any corn had been brought into the market and sold by the Defendant below; but from the allegation that the sale was by two sacks, it might rather be inferred that the corn was at a distance. As it was manifest, therefore, that this objection had never been urged to the learned judge who presided at the trial, but that his attention had been exclusively directed to the evidence which went to establish the existence of the toll; the Court directed a

Venire de novo.

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BRAMSTON v. ROBINS.

Nov. 17.

REPLEVIN for goods. Cognizance by Defendant, as bailiff to *Thomas Latter* and *James Dashwood*, for 39*l.* 8*s.*, parcel of the sum of 272*l.*, accruing for seventeen years' rent in arrear to the said *T. Latter* and *J. Dashwood*, to the 25th *March* 1824, by virtue of a demise theretofore made at and under the rent of 16*l.* payable quarterly, the residue of the said sum of 272*l.* being satisfied.

Plea, *riens in arriere*; whereupon issued was joined. At the trial of the cause before *Best C. J.*, *Middlesex* sittings in *Easter* term last, a verdict was taken by consent for the Plaintiff, subject to the opinion of the Court on the following case:

In the year 1764, *Henry Dawkins* was seised in fee of the premises for the rent of which the distress was made, being one of two dwelling-houses, Nos. 9. and 10. *Beaufort Buildings, Strand*, in the county of *Middlesex*, and by indenture of the 17th of *October* in that year (1764), made between *Dawkins* of the one part, and one *Henry Mill* of the other part, *Dawkins* demised to *Mill*, his executors, administrators, and assigns, the said dwelling-houses, to hold the same from *Lady-day* 1807, for the term of forty-three years, at the yearly rent of 16*l.*, and 16*l.*, clear of all manner of taxes (except the land-tax), payable quarterly, at the four most usual days of payment of rent in the year; the first payment to be made on *Midsummer-day* next ensuing the commencement of the term.

Latter, the present landlord, and his trustee *Dashwood*, became seised of this property on the 26th *April*

1786.

A landlord's receiver allowed the tenant to make a deduction in respect of a payment for land-tax every year for seventeen years, greater than the landlord was liable to pay, the landlord knowing, or having the means of knowing, all the facts: Held, that he could not distrain for the amount erroneously allowed, though the receipt given every year shewed the amount paid and the amount deducted.

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 {
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1786. On the 28th *December* 1822, *J. Whiting* became possessed of the term demised by the indenture of 1764. From the commencement of the term to the time of *Whiting's* purchasing in the year 1822, the rent of 16*l.* and 16*l. per annum* was paid to *Tyndall* (who acted under a power of attorney from *Latter* to receive his rents, pursuant to a deed of trust for securing an annuity to a third party), the tenant for the time being, deducting first thereout the full amount of the land-tax charged upon the improved value of the two houses (which improved rent was rated at 70*l. per annum*) for each house, agreeable to the following receipt :

“ Received, 16th *May* 1817, of Mr. *Michel*, half a year's ground rent, due to *Thomas Latter*, Esquire, at *Lady-day* last, as under.

Allowed one year's land-tax, due £ s. d.			
<i>Lady-day</i> 1817.	-	-	7 0 0
Cash received	-	-	9 0 0
<hr/>			
£ 16 0 0”			

Whiting and the Plaintiff in this suit were partners, and entered into possession of the premises soon after the 28th *December* 1822, the partnership business being carried on there.

After *Whiting* became assignee of the term, and up to *Lady-day* 1824, the full amount of the rent was paid without any deduction whatsoever in respect of payments on account of the land-tax.

In *April* 1824 a demand was made on behalf of *Latter* upon the Plaintiff for 100*l.* 0*s.* 5*d.*, arrears of rent for the house No. 9., and a similar demand for 100*l.* 0*s.* 5*d.* in respect of the other house, No. 10.

The

The amounts of the assessments made from time to time upon the two houses, in respect of the land-tax, and deducted by the tenants for the time being, without objection on the part of the receiver, (*Latter* residing abroad during the time,) were as follows :

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	£	s.	d.
From 1807 to 1818 - - -	7	0	0
For - - 1819 - - -	10	17	0
1820 - - -	10	16	8
1821 - - -	10	16	6
1822 - - -	9	15	0

The demand made on the behalf of the landlord, and for which the distress in question was made, was for the amount allowed for land-tax from *Lady-day* 1807 to *Lady-day* 1822, upon the surplus assessment over and above the proportion of such assessment as attached to the rent reserved on the lease of 1764, in respect of the house in which the distress was made.

If the Court should be of opinion that the tenants were justified in making such retainer and deduction, or that the Defendant was otherwise precluded from enforcing his demand by way of distress, at the time the distress in question was taken, then a verdict was to be entered for the Plaintiff for the sum of 4*l.* 4*s.* and costs.

But if the Court should be of opinion that the Defendant was entitled to recover, then a verdict to be entered for the Defendant for the sum of 39*l.* 8*s.*, with a finding of the value of the distress.

Wilde Serjeant rose on the part of the Plaintiff, but the Court called on

Lawes Serjeant for the Defendant; he contended that the landlord was entitled to the rent of 16*l.*, and 16*l.*, minus only the land-tax assessment according to the rate
 of

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of 1764; that the tenant had no right to deduct the amount of the assessment upon the improved rent; and as he had deducted it in fact, there had been no payment of the rent reserved: that even a receipt in full would not have been conclusive against a further demand, but that a receipt like that which had been given in the present case, specifying the amount paid and the amount deducted, showed that the amount deducted remained due unless the tenant had a right to deduct it: that acceptance of less than was due was no discharge of the full demand, *Fitch v. Sutton (a)*: and that mere acquiescence in non-payment did not release a debt. The assignee distrained upon might have his remedy over against the assignor, but it would be a great hardship if the landlord were to be deprived of a portion of rent to which he had never renounced his claim.

BEST C. J. The facts of this case are, that from 1807 to 1818 the tenant pays nine pounds a year towards the rent, and the landlord allows the remaining seven on account of a payment made by the tenant for land-tax; in 1819, and subsequent years, a larger allowance is made on the same account, and it is not till 1822 that the landlord is awakened by the disproportion between the amount of the land-tax and the amount of rent. By that time the premises had come into other hands, no doubt under the usual assurance that all previous demands had been discharged. It has been urged that this distress is no hardship upon the tenant, because he may resort to his assignor for indemnity. But the assignor may be insolvent, bankrupt, or dead, and it would be indeed a hardship if the assignee were compellable to pay. If, however, the law were so, we could afford him no relief; and it has been urged

(a) 5 *East*, 229.

that

that payment of part of the rent is no discharge of the whole, to which it is said the landlord has never renounced his claim. But this transaction amounts to a payment of the whole, and for esteeming it so, we have the authority of *Dallas C. J.* and the rest of this Court in the case of *Andrew v. Hancock*. (a) In that case the tenant had paid the full rent, and had omitted to deduct the property tax, which he was entitled to deduct; and the Court held that he could only deduct it at the time of payment. But it is an established principle, that if money be given or paid (and settlement in account is the same thing (b), with a full knowledge of all circumstances at the time of the payment, it cannot be recovered by the payer: *Brisbane v. Dacres*. (c) For seventeen years this rent was settled in account and considered as paid, so that an action for the amount would have been answered by a plea of payment. If, indeed, the landlord had made this allowance under the idea that it was for the amount of the assessment on the old rent, and without the means of knowing that it was the assessment on the improved rent, it might have been esteemed an allowance by mistake, and made in ignorance, and might perhaps have been recovered: but the landlord must have known, or have had the means of knowing that it was a charge on the improved rent. If he knew, or had the means of knowing all the facts, a mistake as to legal rights would not entitle him to make this claim.

This, therefore, was not a partial payment of the rent from time to time, but a clear settlement of the account with full knowledge, or means of knowledge of the facts on the part of the landlord, who is thereby precluded from sustaining the distress he has made.

(a) 1 *Brod. & Bingb.* 37.

(b) See *Skyring v. Greenwood*, 4 *B. & C.* 281.

(c) 5 *Taunt.* 143.

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PARK J. This was as much a payment as if the tenants had paid down the whole rent, and the landlord had returned the amount of the land tax. The receiver was his agent, and the landlord was bound by the receiver's acts.

BURROUGH J. This is not the case of a single payment, but of a series of settlements for sixteen or seventeen years. What the landlord has allowed in those settlements he cannot claim again. The demand is most unconscientious.

GASELEE J. concurring;

Judgment was given for the Plaintiff.

Nov. 18.

WEBBER v. NICHOLAS.

The costs of a suit in equity may be set off against the costs of an action in this court.

UPON an affidavit by the Defendant, that at the sittings after last *Trinity* term the Plaintiff had obtained a verdict against him for 130*l.*, but that in *April* preceding a bill filed in Chancery by the Plaintiff against the Defendant, on the same matters in difference, had been dismissed with costs for want of prosecution,

Spankie Serjt. obtained a rule *nisi* to set off the costs in equity against the costs in the action. He relied on *Hall v. Ody* (a), *Emden v. Darley* (b), and *Harrison v. Bainbridge* (c), where the defendant was allowed to set

(a) 2 B. & P. 28.

(b) 1 N. R. 22.

(c) 4 D. & R. 363. 2 B. & C. 800.

off

off costs on a bill in Chancery dismissed in his favour against the costs of an action in the Court of King's Bench.

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Vaughan and *Wilde* Serjts., who shewed cause, relied on the disapprobation of the practice expressed by *Eldon* C. J. in *Hall v. Ody*; on the circumstance that the decision in *Harrison v. Bainbridge* was not to the prejudice of the Plaintiff's attorney's lien; and that these costs could not be recovered in action at law.

BEST C. J. According to the practice of this Court the attorney must rely on the stability of his own client. *Hall v. Ody* is express to this point, where the set-off was prayed for the costs of an action in the King's Bench; and no distinction can be drawn between such costs and costs in equity. In *Stephens v. Weston* (a), where an application was made to set off costs and damages in one action against those recovered in a cross action, it was holden, that an attorney has a lien on the judgment obtained by his client against the opposite party, to the extent of his costs of that cause only.

PARK J. It does not follow that these costs may not be the subject of a set-off, because they may not be recoverable in an action at law.

The rest of the Court concurring, the rule was made
 Absolute.

(a) 3 B. & C. 535.

1826.

Nov. 20.

WIGLEY v. DUBBINS.

Venue cannot be changed after plea in abatement any more than after plea in bar.

TADDY Serjt. moved for leave to change the venue, after a plea in abatement, of non-joinder.

Though the application was too late after a plea in bar, he said it had never been decided that it would be too late after plea in abatement, for which less time was allowed. The rule of court (*M. T. 1654*) was, "Though the declaration be delivered seven days before the last day of the next precedent term, or after, yet before plea, on oath made, the venue may be changed upon motion in transitory actions, the next term after, and the defendant to plead without delay;" but this rule had always been applied to pleas in bar.

But the *Court* thought there was no colour for the application, and *Taddy*

Took nothing.

Nov. 20.

BRIDGET and Another v. MILLS.

Proving one debt under a commission of bankrupt does not preclude the creditor from electing to sue for another.

AN affidavit of the Defendant stated, that a commission of bankruptcy was issued against him, *January 19th, 1826*:

That on the 28th of the same month the Plaintiffs proved against him a debt of 242*l.* 13*s.* 11*d.*, for goods sold and delivered:

That on the 1st of *September* following they proved another debt of 684*l.* 7*s.* 9*d.* for goods sold and delivered,

livered, in respect of which four bills of exchange had been given :

That on the 22d of the same month they arrested the Defendant on a bill of exchange for 206*l.* 9*s.*, drawn by the Plaintiffs and accepted by the Defendant, payable eight months after date, and that the bill was accepted for goods sold and delivered by Plaintiffs to Defendant in *September* and *October* 1825.

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v.
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Wilde Serjt., upon this affidavit, obtained a rule *nisi* to cancel the bail-bond which had been given in the above action, on the ground that the Plaintiffs by proving under the commission had made their election, and were precluded from suing the Defendant for any debt accruing before the bankruptcy.

Vaughan Serjt. shewed cause upon an affidavit of the Plaintiffs, which stated, that the debts proved under the commission were *wholly distinct from* and *unconnected with* the debt for which this action was brought: that the Plaintiffs had negotiated the bill for 206*l.* 9*s.* before the Defendant became bankrupt, and that it was not returned to or taken up by them till after the month of *June* last.

He relied on *Watson v. Medex* (a), in which it was holden, that the debt proved under the commission being separate and distinct from the debt under which the bankrupt had been arrested, the statute did not apply. The only difference between that case and the present was, that here there had been two proofs, and the bill on which the Plaintiffs sued was in their hands before they made the second proof. The decision, however, in *Watson v. Medex* turned on the circumstance of the debt being distinct.

(a) 1 B. & A. 121.

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Wilde, in support of his rule, endeavoured to distinguish the case of *Watson v. Medex*.

But the *Court* observing that there was nothing in the statute to prevent a creditor from suing for one debt, because he had proved another unconnected with it, and adding, that it was clear he had a right to sue for or to prove each individual debt as might best suit his purpose,

Discharged the rule. (a)

(a) See *Harley v. Greenwood*, 5 B. & A. 95.

Nov. 20.

FLOOK, Assignee of DRING, a Bankrupt, v.

JONES.

September
24th 1824, *D.*,
the obligor,
who, on 14th
of August pre-
ceding, had
quitted pre-
mises he held
of the obligee,
paid the
obligee the
balance on a

THE Plaintiff sued the Defendant for money had and received to the use of the bankrupt, and to the use of the Plaintiff, as his assignee, under the following circumstances, which were made out at the trial before *Best C. J.*, London sittings after *Trinity* term last.

The Defendant was the executor of one *Thomas*, to whom *Dring* the bankrupt had, in *October* 1818, become bound, on a valuable consideration for the lease of a bond due *October* 19th following; the fixtures left on the premises, which were valued on the 24th *September*, being taken in discharge of the other portion of the sum payable under the bond.

In *July* preceding, *D.*, upon looking into his affairs, found he could only pay 17s. in the pound; and he sold his watch and part of his stock to satisfy some claims upon him. *D.* became bankrupt, *October* 28th 1824, but said he had no intention of becoming bankrupt at the time he paid the obligee, though he made the payment because he expected other creditors would get possession of his property.

In an action by *D.*'s assignee against the obligee, Held, that the jury were properly directed to consider, whether the payment were made by *D.* with a view to the probability of his becoming bankrupt, and in fraudulent preference of the obligee.

brewery,

brewery, in a joint and several bond for the payment of 1200*l.* on the 19th of *October* 1819.

In 1819, the obligee not wanting his money, took another bond from *Dring* for the same amount, payable the 19th of *October* 1822.

Thomas having died, the Defendant, his executor, extended the time of payment to *October* 19th, 1824.

In *August* 1822 a great part of the brewery was consumed by fire, and *Dring's* lease terminating *August* 14th 1824, the Defendant about that time agreed to take the fixtures at a valuation, and deduct the amount from the sum due on the bond.

On the 24th of *September* 1824, the fixtures having been valued at 422*l.* 10*s.* 11*d.*, *Dring* paid to Defendant 826*l.* 1*s.* 7*d.*, the balance remaining on the 1200*l.* payable on the bond due the 19th of *October* following, and the bond was delivered up to him.

On the 28th of *October* a commission of bankruptcy was issued against *Dring*, upon an act of bankruptcy committed on the 18th.

Dring, who was called as a witness, said, that in the middle of *July* he had examined his affairs, and found he was able to pay 17*s.* in the pound; that upon the expiration of his lease he had sent two or three times to the Defendant about the calculation of the fixtures, and had sold part of his stock to raise money to pay the balance on the bond, when the valuation was completed.

That he was indebted to his bankers 1700*l.*, and that they had desired him to shorten his account. That he had paid in 200*l.* shortly before his bankruptcy, and thought the bank would give him a little time; that having a large sum to make up about the same time for duty, he sold his watch and plate and some malt at a loss; that he paid the money on the bond to exonerate his sureties, and because he expected other creditors would get possession of his property, though he had no intention

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v.

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intention at the time to become a bankrupt. Another witness stated, he had told *Dring* some time before the bankruptcy, that nothing but a bankruptcy could settle his affairs.

The Plaintiff's counsel contended that this payment was a fraudulent preference, and made in contemplation of bankruptcy, and relied on *Poland v. Glyn. (a)*

The

(a) 2 D. & R. 311.

The following note of this case has been furnished by a gentleman at the bar:—

POLAND, Assignee of MELANCHEZ, a Bankrupt, v. GLYN.

This was a question of fraudulent preference. A verdict having been found for the Plaintiff, the assignee of the bankrupt,

Denman moved for a rule nisi for a new trial; when

ABBOTT C. J., who tried the cause, read his notes of the evidence, and stated, that the bankrupt being called as a witness, swore that the Plaintiff was petitioning creditor; that a large debt being due to the Plaintiff, he (the bankrupt) was arrested on the 24th *December*, and the act of bankruptcy was an imprisonment commencing on that day; that a bill for a considerable sum, accepted by the bankrupt, became due to the Defendant on the 13th of *December*; payment of this bill was made on the 14th. "I applied (said the bankrupt) in *September* preceding to the Plaintiff to borrow money. I could not go on without it. I paid the Defendant the balance due to him on the 14th of *December*. I paid him

because I thought I was bound in honour to do so; but I did not know that bankruptcy was inevitable." Another witness said, he told the bankrupt in *September* that a bankruptcy was the only mode of settling his affairs. The bankrupt was then recalled, and stated, that he had proposed an assignment for the benefit of his creditors, but had been told that it would not be accepted. *Abbott C. J.* said he told the jury, that the object of the bankruptcy laws being to divide the whole of the bankrupt's property equally amongst his creditors, if a tradesman found himself in such a situation *that in the judgment of any reasonable man a bankruptcy was inevitable*, no voluntary payment by him could be good, although it might be otherwise if it were made under threat or pressure. The bankrupt avowed that he knew he could not go on in *September*; and why should he think himself bound in honour to pay the Defendants, unless he thought he could not pay others?

BAYLEY J. *This was entirely a question for the jury*, and I think there is no reason to complain of the manner in which it was left to them. It is a rule of law, that if a man be in such a situation that he must be presumed to think bankruptcy probable,

The Chief Justice told the jury that if they believed that *Dring*, at the time of the payment in question, knew he could not go on, knew that there was a probability of his becoming a bankrupt, and had preferred a particular creditor in contemplation of bankruptcy, the Plaintiffs would be entitled to a verdict.

A verdict having accordingly been found for the Plaintiffs,

Taddy Serjt. moved for a new trial, on the ground that in none of the former cases had a payment made so long before the act of bankruptcy, and upon probability only of an act of bankruptcy, been deemed a fraudulent preference made in contemplation of bankruptcy. In *Harman v. Fisher* (a), the payment was made at the time of the act of bankruptcy. So in *Rust v. Coo-*

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v.
JONES.

able, then, if he makes a payment with a view to put one creditor in a better situation than the rest, such payment cannot be supported. The bankrupt said, he paid, not in consequence of any demand, but because he thought he was bound in honour. The whole of the case, and his credibility, was entirely a question for the jury. If it was probable that a bankruptcy must ensue, then it may be predicated of him that he contemplated it.

HOLROYD J. I think there is no ground for disturbing the verdict. The bankrupt says he paid this debt because honour bound him. Perhaps honour did bind him; but so it did in *Harman v. Fisher*. Here there was sufficient evidence upon which the jury might conclude that the bankrupt contemplated bankruptcy.

BEST J. I think the direction of the Lord Chief Justice was

right, and the finding of the jury right. The effect of the bankrupt laws being to make a rateable distribution of the property, any disposition of his property made by the bankrupt to defeat that object is a fraud upon the bankrupt laws. *There can be no reasonable doubt that this payment was made in contemplation of bankruptcy*; for in September he clearly contemplated insolvency, having at that time offered an assignment for the benefit of his creditors. That being rejected, he must have known that bankruptcy would follow. The bankrupt was not moved to the payment by any thing done by the Defendant; he paid because bound in honour. If he did not know he was insolvent, why was he bound in honour to pay Defendant's debt first? Clearly, therefore, he did contemplate bankruptcy.

Rule refused.

(a) *Cowp.* 123.

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per. (a) The rule was clearly laid down in *Hartshorn v. Flodden* (b), "Any payment made by a trader before an act of bankruptcy, and in contemplation of such act, and with a view on his part to give a preference to a particular creditor, is void;" and the same rule was adhered to in *Fidgeon v. Sharp*. (c) The bankruptcy must be impending, and not merely probable. But where, as in the present case, the payment was made more than a month before the bankruptcy, at a time when the bankrupt was worth 17s. in the pound; where the payment was also of a bond debt, which was in other cases intitled to some priority; where the bankrupt himself affirmed that he did not at the time contemplate bankruptcy, the payment could not be said to be a fraudulent preference, or made in contemplation of bankruptcy.

The case of *Poland v. Glyn* was certainly an authority which might be relied on for the Plaintiffs, but it was inconsistent with all the preceding cases. A rule *nisi* having been granted,

Wilde Serjt. now showed cause; he commented on the facts of the case, and contended, that they amply warranted the Jury in finding that the payment was made in contemplation of bankruptcy, and in fraud of the bankrupt laws, although made a month before the act of bankruptcy.

Taddy in support of the rule. The principle is, Had the party the intention to commit a fraud on the bankrupt laws? If the fair result of the evidence be merely, that the party finding his circumstances failing, determines to pay a creditor who is intitled to a legal priority, he cannot be said to contemplate an illegal act. To make it illegal, it must be in distinct contemplation of a distribution, different from that which the law would

(a) *Cowp.* 629. (b) 2 B. & P. 587. (c) 5 *Taunt.* 547.

make. That is, he must *distinctly* contemplate an act of bankruptcy. If it merely amount to this, that under the circumstances the party may *probably* become bankrupt, it cannot be said to be in contemplation of any illegal act. The bankruptcy must be inevitable, or at least impending.

The principle of the early cases is this: that, as a man cannot, after an act of bankruptcy, dispose of his property, neither shall he do so when he is just about to commit one. To permit the Plaintiffs to recover in the present case would be an extension of the words of the statute:

They have pointed out a distinct point of time, by which generally the rights of the parties are fixed; and the consequence of carrying the extension of the words of the statute to a case of probability of future bankruptcy may go to an indefinite extent.

BEST C. J. Many important facts are omitted in the published report of the case of *Poland v. Glyn*, and they are such as would prevent it from being applicable on the present occasion. But all the Court are of opinion, that in this case the law was correctly stated to the jury, and I think they came to a right conclusion; however, as we are not unanimous on that point, a new trial will be granted on payment of costs.

PARK J. The law is correctly stated in *Fidgeon v. Sharpe*; but I cannot accede to it as laid down in the printed report of *Poland v. Glyn*. My doubt on the present occasion is, whether the jury sufficiently considered what was the state of mind of the bankrupt at the time of the payment.

BURBROUGH J. My opinion is founded on the great importance of this question to the interests of trade.

The decision of a jury in such cases ought not to rest

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on nice distinctions, but on some palpable fact, from which they may presume that an act of bankruptcy was in contemplation at the time of payment.

The only person in the present case to speak directly to that point, is the bankrupt himself; and he denies that he had any such act in contemplation; the opposite inference can only be collected from shreds and patches of evidence, which are not a sufficient ground for a safe conclusion.

GASELEE J. I think the case was properly left to the jury, and that they have come to a right conclusion; but as they may not have taken all the circumstances of the case into their consideration, a new trial may be had upon payment of costs.

Rule absolute.

Nov. 21.

JONES v. SILBERSCHILDT.

CHAPPELL v. Ditto.

WORSLEY v. Ditto.

S. having occasion to raise 2800*l.* by way of annuity, desired the annuities to be divided into three; the consideration for all three was paid at one time and

VAUGHAN Serjt. moved to set aside three annuities granted by the Defendant to the above Plaintiffs, and to vacate a judgment entered up against him pursuant to warrants of attorney, on an affidavit which stated that the Defendant, a *Dane*, applied through his solicitors to *Howard* and *Gibbs* to raise 2800*l.*, which they agreed to do upon the grant of annuities to the amount of 454*l. per annum*;

place to one person, who was agent to all the grantees, and he retained 300*l.* for the expences of all three annuities: Held, that all three might be set aside on equitable terms on account of this retainer, although the 300*l.* was retained in a bank note, which formed part of the consideration money of only one of the grantees.

That

That the Defendant thereupon, in consideration of 770*l.* expressed in the deed to be paid, granted by indenture of *January* 31st, 1818, an annuity of 124*l.* payable to the plaintiff, *Jones*;

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v.
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CHILDT.

That by another indenture bearing the same date, he granted an annuity of 250*l.* to *T. Chappell* in consideration of 1540*l.* expressed by the deed to be paid;

That by a third indenture bearing the same date, he granted an annuity of 80*l.* to *P. Worsley*, in consideration of 490*l.* expressed by the deed to paid;

That the deeds were drawn up by *Howard* and *Gibbs*, who acted as agents to Plaintiffs, and the annuities were divided into three at the request of Defendant, the grantor;

That the Defendant, in company with his solicitor, attended at *Howard* and *Gibbs's* office on the day of the date of the deeds, when, after the execution of the deeds, and after Defendant's solicitor had withdrawn, *Gibbs* gave the Defendant 2400*l.* or 2500*l.* instead of 2800*l.*, retaining the residue by way of commission for the loan, and for expences of deeds, though he never handed Defendant any account of the charges. The Court referred the matter to the prothonotary; and he reported, that it being usual to indorse on the deeds the numbers of the bank notes in which the consideration was paid, he had discovered that the 300*l.* returned, was one of the notes alleged to have been paid for the consideration of the annuity to *Chappell*; he also found that *Howard* and *Gibbs* were the agents of the grantees, and that the money was retained or returned upon the execution of the deeds. A rule having been granted,

Wilde and *Spankie* Serjts., after having urged that *Howard* and *Gibbs* were not agents for the grantees, and that therefore there was no retainer, opposed the rule on the part of *Jones* and *Worsley*, on the ground that the annuity having been divided into three at the request

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quest of the grantor, the considerations were distinct, and the payments distinct, so that the return or retainer, if any, applied only to the transaction with *Chappell*.

Upon the first point, the *Court* were clear that *Howard* and *Gibbs* must be deemed the agents of the grantees, who were responsible for the retainer by their agents, according to the decisions in *Williamson v. Gould* (a) and *Calton v. Porter*. (b) Upon the second,

BEST C. J. said, The whole transaction was originally one; all the money was paid at one time by the Defendant, the agent of the three parties received it all, and did not retain the 300*l.* for any one of the three annuities, but for the expences of all. We should be trifling with the act if we did not hold that the retainer extended to all three. The annuities must be set aside on equitable terms, deducting what may be due for principal and interest at 5 *per cent.*

Rule absolute.

(a) 1 *Bingh.* 171, 234.

(b) 2 *Bingh.* 370.

Nov. 22. Sir JOHN PERRING, Bart., SHAW, and BARBER v.
HONE.

The Plaintiff's name was entered in a book with those of several other subscribers to a projected joint stock company. THE Plaintiffs sought to recover 2000*l.* on a promissory note, given by the Defendant and others to the Plaintiffs' firm under the following circumstances, The Plaintiff received certain scrip receipts, but sold them before the deed for the formation of the company was executed, and he was not a party to that deed:

Held, nevertheless, that he was a partner in the concern.

as proved at the trial before *Best C. J.*, *London* sittings after *Trinity* term last. The declaration contained counts on the promissory note, and for money lent, paid, &c. The Defendant, and other persons parties to the note, had in the year 1825 projected a joint stock company, to be called the Imperial Distillery Company. Having occasion to borrow money for the purpose of the concern, these parties, in *August* 1825, signed a joint and several promissory note for 2000*l.*, payable to the Plaintiffs' order two months after date. The 2000*l.* was advanced to the company in the Defendant's presence, and paid into the bankers on account of the company. When the note became due, a moiety only was paid, and the note on which the present action was brought was given for the residue. This latter note, as originally drawn, and when signed by the Defendant and other members of the company, was joint, and not joint and several; and the secretary for the company afterwards, without the knowledge of the Defendant, interlined the words *jointly and severally* to make it conformable to the first note. An application by letter having been made to the Defendant to pay his *joint and several* note; he returned for answer, that the communication should have his earliest attention.

At the time when the company was projected, the names of Sir *John Perring* and Mr. *Shaw*, along with many others, were entered in a book as some of the original subscribers to the undertaking, and certain scrip receipts were issued to them by the directors, which scrip was afterwards sold by Sir *John* and Mr. *Shaw* before the execution of the company's deed, which deed was never signed by them. The deed contained a provision, that no member of the company should dispose of his share without notice to the directors of the name and address of the transferee.

Upon this evidence the Chief Justice thought that

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the note was void against the Defendant, and that the Plaintiffs continued to be partners in the concern; he therefore directed a nonsuit, with leave for them to move to set it aside and have a new trial, or a verdict entered for 1025*l*.

Taddy Serjt. moved for a rule *nisi* accordingly, on the ground that Sir *John Perring* having sold his scrip, and having never executed the partnership deed, was not a partner in the concern; and that the alteration in the note having been made by the secretary to the company, must be taken to have been made with the Defendant's assent, especially as the first note was in the same form; and the Defendant wrote afterwards, saying, the matter should have his attention.

Wilde Serjt. opposed the rule. Sir *John Perring* became a partner upon his name being entered with his assent in the books of the company: the acceptance of the scrip was evidence of such assent; and he could not divest himself of the partnership by merely selling the scrip. The consequences would be mischievous if persons of substance were to obtain credit for a company by publishing their names as members, and then to exempt themselves from responsibility as soon as any charge accrued. The members of the company were all partners as soon as they agreed to carry on the undertaking, and they could not transfer to others a mere privity of contract which existed among themselves.

At all events, the alteration of the note from a joint to a several responsibility has been effected without the Defendant's knowledge. Without a new stamp, even an acknowledgment by the Defendant would not establish the note; but the Defendant's letter did not amount to an acknowledgment favourable to the Plaintiffs' demand against him.

Taddy.

Taddy. If all the members of the company whose names are entered in the original book are partners, the Defendant is a partner also, and as such, cannot object to the alteration of the note (*Bolton v. Puller* (a)), which was effected by the secretary of the company. Under such circumstances the alteration must be taken to have been effected with the Defendant's assent, and therefore does not exonerate him: *Kershaw v. Cox* (b): the alteration, too, having been made pursuant to the original note to which the Defendant was a party, and being in effect a continuation of the same transaction, is binding on him whether a partner or not. But the note having been given to the Plaintiffs, not in their capacity of partners in the company, but as bankers, and on a separate account, they are entitled to sue the Defendant upon it. The circumstance of Sir *J. Perring's* being a partner in the distillery company, though it might preclude him in the character of a member of that company from suing the Defendant, does not preclude him from suing in a totally different character, namely, as here, in the character of a lender of money to the company. Sir *J. Perring*, however, was not a partner, for he neither acted in the concern nor signed the deed, and one of the two things was necessary to constitute him a partner. In *Fraser v. Hopkins* (c) it was holden, that the entry of a person's name in the custom-house books would not constitute him the responsible owner of a ship, unless he acted as such. The sale of scrip by Sir *J. Perring* amounted to nothing; it was not the transfer even of a chose in action, but a mere claim to engage in an inchoate undertaking.

BEST C. J. I reserved these points at the trial, not because there seemed to be any difficulty in them, but because the first, at least, is of very general import-

(a) 1 B. & P. 546. (b) 3 Esp. N. P. C. 246. (c) 2 Taunt. 5.

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ance. With regard to the second, it is clear that the note was altered after it had been signed by the Defendant. He subscribed a joint promissory note, which afterwards was made joint and several without his knowledge; as to him, therefore, it became void unless his subsequent assent can be shewn; but there was nothing adduced to shew that assent, beyond a letter, in which he says, the application made to him on the subject of the note shall have his earliest attention; but giving attention to a matter is very different from giving assent. The assent by the other partners will only bind the Defendant with respect to acts necessary to carry on the partnership, but they have no authority to make a joint and several note binding on a partner who does not sign, where the note is not subscribed in the name of the firm, but by the individuals severally composing it.

It is clear, therefore, the Plaintiffs cannot recover on the promissory note. Can they then recover the money as lent to the Defendant? It was proved, indeed, that he was present when the money was advanced; but it was not advanced to him, but to the Imperial Distillery Company, and paid into the bankers on account of the company.

The Plaintiffs, therefore, as partners in the concern, were precluded from suing the Defendant. It has been contended that none were partners but they who signed the deed. But all who subscribed to the partnership fund must be taken to have assented to the deed; an assent which the Plaintiffs countenanced by afterwards attempting to dispose of their interest. Even if there had been nothing in the deed to bind them, they could only get rid of that interest by regular notice in the Gazette; but it was provided by the deed, that notice should be given to the directors of the person to whom it was proposed by any of the members to make a transfer. Without such a provision, any person might hold

hold a share as long as it was advantageous, and then dispose of it to a pauper, cheating the creditors and his co-contractors. But a party who has once engaged in a concern of this nature cannot so easily divest himself of his liability. The present decision will render persons of eminence more cautious in lending their names to an undertaking with a view of selling out when shares are at a premium, and leaving the deceived to suffer.

My brothers *Parke* and *Burrough* (a) coincide in the decision which has been pronounced, and therefore the rule must be discharged.

GASELEE J. I think this nonsuit ought to stand, on two grounds. Whatever weight there may be in the argument that partners may bind their firm, is answered here by the circumstance that the Defendant had signed the note himself, and that it was afterwards altered without his assent. That alteration renders the note void.

Sir *John Perring* having been an original subscriber to the undertaking, and consequently a partner, it is unnecessary to decide how far he incurred or could divest himself of liability by the purchase and sale of scrip receipts.

Rule discharged.

(a) They had left the court when the argument closed.

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MACBEATH v. COATES.

By the 6 G. 4. c. 16. it is enacted, that when notice is not given to dispute a bankruptcy, it shall be proved by the production of the commission.

Where, upon a trial, no notice having been given to dispute the commission, the proceedings under a commission were put in, as well as the commission, and a perfect petitioning creditor's debt did not appear upon the proceedings: Held, nevertheless, that the validity of the commission could not be disputed.

TRESPASS for entering the Plaintiff's house, and assaulting him.

The Defendant justified under a commission of bankruptcy issued against the Plaintiff, averring that no more violence was resorted to than was necessary.

At the trial before *Best* C. J., sittings after last term, no notice having been given to dispute the bankruptcy, the commission and proceedings under it were put in as evidence of that fact, instead of the commission alone, pursuant to 6 G. 4. c. 16.

Upon reading the proceedings, however, it did not appear by them that a sufficient petitioning creditor's debt had been established; but there was nothing on the proceedings to show that such a debt did not exist. Upon the supposed defect of evidence, however, of a petitioning creditor's debt, a verdict was found for the Plaintiff, which

Vaughan Serjt. obtained a rule *nisi* to set aside, and enter a nonsuit instead, on the ground that the commission was to be taken as conclusive evidence of the bankruptcy, unless notice was given to dispute it.

Wilde Serjt., who opposed the rule, contended that even if the commission were conclusive evidence of the bankruptcy, the proceedings under it, when once put in, must be taken subject to any infirmity which might appear on the face of them; and that though the statute 6 G. 4. c. 16. s. 92. exempted the assignees from the necessity of proving the commission where no notice

was given to dispute it, yet there was nothing in the act to prevent other parties from disproving it, or, at all events, from making use of documents given in evidence. In the language of the statute, they were only to be evidence of the matters therein contained. When the commission and proceedings under it were once given in, it was competent for the opposite party to point out that they did not prove what they professed to prove. Under the former statute the alleged bankruptcy might always be disproved, (*Ellis v. Shirley* (a), *Mills v. Benett* (b), *Richmond v. Heapy* (c), *Brown v. Forrestall* (d),) although the assignees were spared the necessity of any other proof than the commission where the bankruptcy was not disputed.

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Vaughan, in support of his rule, urged that if any part of the proceedings had been read improperly, it might be struck out of the evidence. *Bluck v. Thorn*. (e)

BEST C.J. By 6 G. 4. c. 16. s. 92. it is enacted, "That if the bankrupt shall not (if he was within the united kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the united kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of or previous to the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained in all actions at law or suits in equity brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit." That

(a) 3 *Campb.* 424.
 (b) 2 *M. & S.* 556.
 (c) 4 *Campb.* 207.

(d) 1 *Holt*, 190.
 (e) 4 *Campb.* 191.

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is the same thing as if it had been enacted that no other proof shall be given under such circumstances. For if any proof might be given, the remedy intended by the act might be entirely defeated. A party who came prepared with a commission might be met by evidence he did not expect, and placed in a worse condition than if he had never been excused by the legislature from giving evidence of the whole of the proceedings. This is a point on which the legislature has said no issue shall be raised; and if no issue can be raised, the evidence put in must be deemed immaterial.

PARK J. I am of the same opinion. The act referred to is remedial, and the Court must advance the remedy intended. The Defendants establish their case by putting in the commission; but all the proceedings being also put in, the affidavit of the petitioning creditor's debt appears imperfect. That, however, does not affect the Defendant's case, since it is a matter which the act of parliament has excluded.

BURROUGH J. The act says that the bankruptcy, if no notice be given of an intention to dispute it, shall be taken as proved by the production of the commission. But there being nothing in the depositions to disprove the debt, the commission has sufficiently established it; and we should defeat the intentions of the legislature, if in a case like the present we were to drive the assignees to any proof beyond the commission.

GASELEE J. There was nothing in the proceedings under the commission to show that the commission was not valid; but when the act says that no evidence shall be required beyond the commission, it means that no evidence beyond the commission shall be admitted on either side, otherwise the assignee would be deluded by the act.

Rule absolute.

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SWEENIE v. SHARP.

Nov. 25.

THE Defendant, an insolvent, had given a *cognovit* for a debt, on which legal proceedings had been commenced before he was discharged under the insolvent debtor's act. Judgment having been entered up, and execution issued thereon,

A *cognovit* given by an insolvent after his discharge upon proceedings commenced before, constitutes a new promise, upon which he becomes liable, notwithstanding his discharge.

Wilde Serjt. moved to set it aside, on the ground that the *cognovit* was void, as being in contravention of the spirit of the insolvent debtor's act, by which it was intended to exonerate the insolvent from all debts due before his discharge.

The *cognovit* could not be esteemed a new promise, and creating a new debt subsequent to the discharge, for it was in continuation and termination of the preceding suit. It could not even be esteemed a voluntary act; for if the demand were just, it was the Defendant's duty and interest to acknowledge it, rather than incur further costs.

On the part of the Plaintiff it was contended that this was a new promise on good consideration, and binding on the insolvent.

Wilde having been heard in support of his rule,

BEST C. J. said,—If instead of giving a *cognovit*, and then applying to set it aside, the Defendant had moved to stay proceedings, the Court would have assisted him; but the *cognovit*, which he was not compelled to give, is tantamount to a new agreement, from which he is not

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entitled to be discharged. The object of the legislature was to protect the insolvent from demands in respect of debts accruing before his discharge, and not from new engagements entered into afterwards. It is true that this is a judgment on an old debt, but the judgment has been obtained in a manner which constitutes a new agreement, and an agreement which the Defendant must be taken to have entered into voluntarily.

PARK J. and BURROUGH J. concurred.

GASELEE J. The act does not vest the insolvent's future property in the assignees, but enables them to enter up a judgment for the purpose of obtaining it, and permitting any new creditor to come in. It has been decided, that a certificated bankrupt may render himself responsible by a new promise, and the present case falls within the equity of such a construction of the acts. Here is a deliberate act of the party permitting a judgment to be entered up against him, and it is immaterial whether the judgment be on an old debt or not.

Rule discharged.

Nov. 25.

BROWNE v. BROWN.

If hired bail be put in on a writ of error, the Plaintiff may issue execution.

THE Defendant had put in hired bail upon a writ of error, whereupon the Plaintiff issued a *fi. fa.*: which

Wilde Serjt. obtained a rule *nisi* to set aside, upon an affidavit that the attorney had instructions to put in good bail, and put in the hired bail intending to add good

good ones afterwards ; the clerk of the errors having informed him, that he was not aware of any rule of court to prohibit such bail. No rule for better bail had been served.

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Taddy Serjt., *contra*, cited *Ward v. Levi (a)*, in which the Court of King's Bench had set aside with costs a rule obtained under similar circumstances ; and

Per Curiam. Attornies ought to know the practice, and that the Court of King's Bench has decided that such bail shall not be put in. It is a fraud on the Court.

Rule discharged with costs.

(a) 1 B. & C. 268.

PICARD v. FEATHERSTONE.

Nov. 25.

VAUGHAN Serjt., upon a suggestion that this action was brought upon a writing, though that fact did not appear on the declaration, opposed a rule *nisi* which had been obtained by *Cross Serjt.*, for changing the *venue*. He cited *Morrice v. Hurry (a)*, where a similar application was discharged, it appearing on the declaration that the action was brought on a charter-party.

The circumstance of an action's being brought on a writing is not a ground for rejecting an application to change the venue, unless the declaration disclose the existence of the writing.

Per Curiam. All we need say here is, that it does not appear on the declaration that the action was brought on a writing.

Rule absolute.

(a) 7 Taunt. 306.

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WELLS v. HORTON, Executor of CHARLES
BLISSETT.

A. being indebted to Plaintiff, promised Plaintiff, that in consideration of his forbearing to sue, *A.*'s executor should pay him 10,000*l.*:

Held, that this was not a promise required by the statute of frauds to be in writing.

THE Plaintiff declared: That said *Charles* in his lifetime, to wit, on the 1st *January* 1808, to wit, at *London*, was indebted to *Mary*, now the wife of Plaintiff, then being sole and unmarried, in a large sum of money, to wit, the sum of 10,000*l.*, for money by said *Mary* before that time lent and advanced to *Charles* at his special instance and request, and for other money by *Charles* before that time had and received, to and for the use of *Mary*, and for other money before that time and then due and payable from *Charles* to *Mary* for interest upon and for the forbearance of divers other sums of money before that time due and owing from *Charles* to *Mary*, and by *Mary* forborne to *Charles* for a long space of time before then elapsed, at the like special instance and request of *Charles*; and said 10,000*l.* being and remaining wholly due and unpaid, *Charles* in his lifetime afterwards, and after the intermarriage of Plaintiff and *Mary*, to wit, on the 1st *January* 1816, to wit, at, &c., in consideration that Plaintiff, at the special instance and request of *Charles*, would forbear to proceed against *Charles* for the recovery of said 10,000*l.* during his lifetime, undertook and then and there faithfully promised Plaintiff that his executor should, after his decease, as such executor, pay to Plaintiff said 10,000*l.*; and Plaintiff avers that he, confiding in said promise and undertaking of *Charles* so by him in his lifetime made as aforesaid, did forbear to proceed against *Charles* for the recovery of said 10,000*l.* during his lifetime, to wit, at, &c. And Plaintiff further saith, that after the death of *Charles* divers goods and chattels which were

of

of *Charles* in his lifetime of great value, to wit, of the value of 12,000*l.*, to wit, on the 1st *January* 1826, at, &c., came into the hands and possession of Defendant, as executor, to be administered, which goods and chattels were more than sufficient to pay the just debts, and legacies, and funeral expences of *Charles*, and the charges of proving his will, to wit, at, &c., of all which premises Defendant then and there had notice. By reason of which premises, Defendant, as executor as aforesaid, then and there became liable to pay Plaintiff said 10,000*l.*, when he, Defendant, should be thereunto afterwards requested: and being so liable, Defendant, as executor as aforesaid, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c., undertook and then and there faithfully promised Plaintiff to pay him said 10,000*l.* when he, Defendant, as executor as aforesaid, should be thereunto afterwards requested.

Plea, general issue, and the statute of limitations.

At the trial before *Best C.J.*, *London* sittings after *Trinity* term last, the testator's liability and undertaking were proved by oral evidence only, to the effect stated in the declaration, a single witness speaking to a conversation with the testator to that effect as far back as the year 1815; and it was objected, that the promise ought to have been in writing under the statute of frauds; a verdict was therefore taken for the Plaintiff, with leave for the Defendant to move to set it aside, and enter a nonsuit.

Onslow Serjt. having obtained a rule *nisi* accordingly, the Court now called on him (and *Wilde* Serjt. with him) to support their rule.

By the statute of frauds, no action shall be brought on any agreement that is not to be performed within one year from the making thereof, unless the agreement, or some memorandum or note thereof, shall be in writing. And although it has been decided, that where the agree-

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agreement is to be performed upon a contingency, and it does not appear on the face of the agreement that it is to be performed after the year, there a note in writing is not necessary, (*Peter v. Compton (a)*), yet, as much diversity of opinion has existed on the point, for *Holt C.J.* differed and continued to differ from the other Judges, (*Smith v. Westall (b)*, *Francam v. Foster (c)*), it may be allowable to revert to the original meaning and plain construction of the statute.

The object of the statute was to prevent recourse being had to uncertain memory at a distant period of time, and that object would be defeated if a man might enter into an engagement to be carried into effect after his death, and the engagement be proved by oral evidence ten years after it was made. Under ordinary circumstances, too, a man does not contemplate that an undertaking to be accomplished after his death is an undertaking that will be performed within a year. The case of *Fenton v. Emblers (d)* is certainly an authority the other way; but in *Reynolds v. Spencer Cowper (e)*, it was decided that a promise to be performed on a contingency which might or might not happen within a year after making the promise, was void within the statute of frauds; and the counsel in *Fenton v. Emblers* said he had searched, and found the case in *Viner* correct. In *Boydell v. Drummond (f)*, and in *Bracegirdle v. Heald (g)*, contracts were held to fall within the meaning of the statute where only a part of them could not be performed within a year.

BEST C. J. If I were to keep out of view all the decisions, I should say this was not a case within the statute. The words of the statute are, "No action shall

(a) *Skin.* 353.

(b) 1 *Ld. Raym.* 316, 7.

(c) *Skin.* 326.

(d) 3 *Burr.* 1278.

(e) 5 *Vin. Abr.* 525. *Contr. and Agr.*

(f) 11 *East*, 142.

(g) 1 *B. & A.* 722.

be brought whereby to charge any defendant upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, or some memorandum or note thereof, shall be in writing" (a); and the plain meaning of them is confined to contracts which by agreement are not to be carried into execution within a year, and does not extend to such as may by circumstances be postponed beyond that period; otherwise there is no contract which might not fall within the statute.

It is admitted that, not long after the passing of the statute, the twelve Judges were called together, and Chief Justice *Holt* alone differed in opinion; that the same point afterwards came before the Court in *Fenton v. Emblers*, and that it was agreed by all the Judges that such a contract was not within the statute.

The present case is clearly distinguishable from *Boydell v. Drummond*, where upon the face of the agreement it appeared that the contract was not to be executed within a year.

PARK J. The contract arises on an engagement that in case of forbearance a certain sum should be paid by the executor of the party, in which there is nothing to shew that the contract is not to be performed within a year. The thing rests on contingency, and clearly may be performed within a year. I agree with my Lord Chief Justice, that, in order to bring the contract within the statute, it ought to be expressly stipulated not to be performed within a year.

It is true Lord *Holt* thought otherwise; but all the other Judges of *Westminster Hall* concur in the construction now put on the statute. In *Peter v. Compton* (b), it is laid down that, "Where the agreement is

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(a) 29 Car. 2. c. 3. s. 4.

(b) *Skin.* 353.

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to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenour of the agreement that it is to be performed after the year, there a note is necessary; otherwise not." Here is the express distinction, that the postponement beyond the year ought to appear on the face of the contract in order to bring it within the statute. *Wilmot J.* agrees with the case in *Salkeld*, and says the statute only applies to cases where by express provision the contract is not to be performed within the year. In *Fenton v. Emblers*, Lord *Mansfield* was of the same opinion, and denied the authority of the case cited from the Exchequer.

BURROUGH J. The question has long since been set at rest, and I hope it will not be again disturbed.

GASELEE J. If we had for the first time been called on to put a construction on the statute, I am not prepared to say I should coincide in the decision we now pronounce. The policy of the act is to prevent perjury with respect to contracts entered into at a distant interval of time. In order to attain that object, it ought to appear on the face of the contract that it will be performed within the year, because there is no contract which may not by accident be delayed beyond the year. But as the Courts have always agreed in a different construction, it would be too much now to introduce a new one; I therefore agree with the rest of the Court, that this rule must be

Discharged. (a)

(a) See *Gilbert v. Sykes*, 16 East, 154.

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DEAN and Another, Assignees of PRINCE, a Nov. 25.
Bankrupt, v. M'GHIE and Another.

ASSUMPSIT against the Defendants as brokers employed by *Prince* to collect sums of money due to him. Breach; the not rendering to him or his assignees a true and just account of the monies collected by them.

There were also counts for money had and received to the use of *Prince*, and to the use of the Plaintiffs as assignees, and on accounts stated with *Prince* and with Plaintiffs as assignees. Plea, general issue, with notice of set-off.

At the trial before *Best C. J.*, *London* sittings after *Trinity* term last, the facts were as follow :

In *November* 1825, *Prince*, the owner of the ship *Rosalind*, being already indebted to *R. L. Chance*, borrowed 4000*l.* more of him, and by way of security transferred to him by bill of sale the ship *Rosalind*, then on her voyage home from *Honduras*, and certain policies of insurance effected upon her. The habendum was, to "have and to hold the said ship or vessel and policies thereby assigned unto and by the said *R. L. Chance*, his executors, administrators, and assigns, subject" to a proviso for redemption on payment of 8000*l.* with interest on the 16th of *January* 1826. If failure were made in the payment, *Chance* was authorized to sell the vessel under a power of sale.

The money not having been paid, a captain employed by *Chance*, on the 26th of *January* 1826, took possession of the vessel on her return home, about seven miles below *Gravesend*; and his brokers gave notice to the parties

By the mortgage of a ship, accruing freight passes to the mortgagee, notwithstanding 6 G. 4. c. 110. s. 45., which enacts that the mortgagee shall not be deemed owner, except for the purpose of making a transfer.

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parties who had goods on board, and claimed the freight from them.

Chance having put up the ship for sale, and the seamen being clamorous for their wages, the defendants paid the portage bill, amounting to 520*l.*, and including the seamen's wages, by a draft obtained from *Chance* for that purpose; and *Chance* then sold the ship under the power of sale, to cover his claim against *Prince*, which amounted to 724*6l.*

Prince was declared a bankrupt Feb. 4. 1826, and in March, *Chance* claimed of the Defendants the 520*l.* which he had advanced for the portage bill.

The Defendants, who had received about 250*l.* of the freight, being then indemnified by *Chance*, refused to pay it over to the Plaintiffs.

Upon this state of facts, the Plaintiffs were nonsuited.

Bosanquet Serjt. on a former day obtained a rule *nisi* to set aside this nonsuit, on the ground that by the bill of sale the ship only passed to *Chance* the mortgagee, and not the freight; that under the 4 G. 4. c. 41. s. 49. and 6 G. 4. c. 110. s. 45., the mortgagee was declared not to be owner except for the purpose of making a transfer, and thereby was precluded from any claim to freight; that the seamen could only enforce their claim to wages, on the ship, and not on the freight; and that the Defendants had paid the wages without authority.

Wilde and *Adams* Serjts. now showed cause. At the time the freight was payable, *Prince* was neither legal nor equitable owner of the ship, *Chance* having taken possession before she arrived in dock; and if *Prince* was not owner, the Plaintiffs can have no claim for the freight. A conveyance of the ship is a conveyance of the freight also. But, at all events, they cannot claim more than *Prince* would have received had he continued owner,
and

and *Prince* could not have obtained the freight without paying the seamen. The captain might have pleaded payment of the portage bill as a set-off to any action against him; and if the captain might set it off, *à fortiori*, the owner might, where it was actually paid by him. So if the Plaintiffs themselves had taken possession, they must have paid the seamen before the goods could have been landed and the freight obtained; and as this is in effect an action for money had and received, the Plaintiffs can only recover according to good conscience. As to the objection that under the stat. 6 G. 4. c. 110. the mortgagee did not become owner, the statute was passed for the benefit of the mortgagee, to exempt him from the responsibility of an owner where he has not actual possession of the ship; but it never was designed to apply to a mortgagee in possession, or to take from him any portion of his security; and his right to the freight under the transfer by bill of sale remains as before the statute: but before the statute, where *M.* assigned a ship to *H.* and charter-party to *A.*, and freight was paid to *H.*, *M.* was held a trustee for *H.* *Morrison v. Parsons.* (a) The same principle was acted on in *Splidt v. Bowles* (b), where it was holden that on the owner of a ship becoming bankrupt, the freight goes to his assignees, although the bankrupt may have disposed of the ship by bill of sale.

Bosanquet and *Taddy* Serjts., in support of the rule, maintained that by the deed of transfer the ship only was assigned to *Chance*, and not the freight; that being mortgagee, he was not owner, according to the express provision of 6 G. 4. c. 110. s. 45.(c); that unless he

were

(a) 2 Taunt. 407.

(b) 10 East, 279.

(c) By which it is enacted,

“ That when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only

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were registered owner, he could incur no liability, and could make no claim. Even his taking possession could not assist him unless he were registered.

As mortgagee, he had no power except to make a transfer of the ship; and as he found a difficulty in effecting that while the seamen were unpaid, the charge for these wages might fall on the ship, but could not fall on the freight. The ship alone could have been libelled for the wages. Case of *Madonna D'Idra*. (a) The wages, indeed, were paid before the freight was received, against which *Chance* having no claim, could set off nothing. The money he advanced he could only claim against the ship in addition to the other debt, and deduct it out of the proceeds of the transfer. The Defendants could not be said to have paid it as agents of *Prince*, because they paid it without his knowledge or authority.

BURROUGH J. (b) *Chance*, the mortgagee, having taken possession of the ship, was liable to pay the sea-

as a security for the payment of a debt or debts, either by way of mortgage or of assignment, to a trustee or trustees, for the purpose of selling the same, for the payment of any debt or debts, then and in every such case, the collector and comptroller of the port where the ship or vessel is registered, shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry, in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect: and the person or

persons to whom such transfer shall be made, or any other person or persons claiming under him or them as mortgagee or mortgagees, or a trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, any more than if such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available, by sale or otherwise, for the payment of the debt or debts for securing the payment of which such transfer shall have been made."

(a) *Dodson*, 37.

(b) *Park J.* was gone to Chambers.

men's

men's wages, and he might act either in his own right or as agent of *Prince*. As agent of *Prince*, he was entitled to authorize the Defendants to receive the freight: having thus the freight in his hands, it would be most unjust if he were not allowed to deduct from it the charges he had incurred for portage.

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GASELEE J. I think the nonsuit in this case was proper. The statute 6 G. 4. c. 110. was passed for the benefit of the mortgagee, and not to deprive him of any means of indemnity against loss.

Here the mortgagee upon taking possession pays money that the mortgagor ought to have paid, and increases his debt by the amount of that payment; and if he received money which the mortgagor had a title to receive, he might fairly deduct the payment from the receipt. But the cases all show that the mortgagee of the ship has a right to the freight.

BEST C. J. I did not reserve the point, because the case seemed so plain. *Chance* having got into possession, authorized the Defendants to receive the freight: whether entitled to it or not, they, as his agents, would have been able to detain the cargo till the freight was paid; and having received the freight, they were entitled to deduct from it the charges, without incurring which the freight could not have been earned. The action for money had and received is an equitable action, and the Defendants may fairly deduct from any demand against them, payments which the Plaintiffs must have made if they stand in the situation of the owner. This would have been a complete defence without considering the effect of the statute 6 G. 4. c. 110.; but the object of that statute was to confer a benefit on mortgagees, by exempting them from charges and responsibilities to which they were before liable. It does not, however,

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prevent them from becoming legal owners, or apply to cases in which the mortgagee has reduced the ship into possession. There is, indeed, an express proviso enabling him to take possession for the purpose of sale or otherwise; that is, for the purpose of discharging the debt due to him, to which the charges incurred in consequence of taking possession make an addition.

The case of *Splidt v. Bowles* only decided that the transferee could not sue for freight on a contract entered into with the transferor, which is very different from a case in which the transferee or his agent receives the freight, and deducts from it charges which the transferor must have satisfied if he had remained in possession. There, too, the freight was due at the time the transferee took possession; here it did not accrue till afterwards, when the ship arrived in the dock; and it is decided by *Morrison v. Saunders* that the right to growing freight passes with the ship. At all events, in an action like the present the Defendants were entitled to deduct from what they had received, charges which the Plaintiffs must have sustained if they had retained possession of the vessel. The rule, therefore, which has been obtained for setting aside the nonsuit must be

Discharged.

Nov. 28.

WADE and Wife v. WADE.

Affidavit to hold to bail; that the Defendant was indebted to the Plaintiff

for money received to the use of his wife.

The process was at the suit of husband and wife:

Held, that the affidavit was insufficient.

THE process was at the suit of Plaintiff and his wife. The affidavit to hold to bail stated the Defendant to be indebted to the Plaintiff for money had and received to the use of Plaintiff's wife.

Wilde

Wilde Serjt. having obtained a rule *nisi* to cancel the bail-bond, on the ground that the affidavit did not disclose whether the money had been received before or after marriage,

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Taddy Serjt., who showed cause, argued that it was immaterial whether the money were received before or after marriage. If it were received after the marriage, the husband was entitled to sue alone; if before, he might either join his wife in the action or sue alone. *Com. Dig. Baron and Feme.*

BEST C. J. I think the affidavit insufficient. The Plaintiff swears the Defendant is indebted to him; but if the money were received before marriage the Defendant is indebted to him and his wife; and the affidavit does not disclose when the money was received.

There is also a variance between the affidavit and process; the process is at the suit of husband and wife, while the affidavit states the debt to be due to the husband alone.

The rest of the Court concurring, the rule was made
Absolute.

RULE OF COURT.

GENERAL RULE as to inserting the Names and Additions of Bail in Notices of justifying the same Bail as have been already put in, or adding other Bail thereto.

Whereas great inconvenience hath arisen, and danger to parties plaintiffs may arise, by the non-insertion, in the notice of justifying the same bail as were put in, or

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of bail intended to be added to the original bail, the names and descriptions of the bail intended to justify, this Court doth order, that from and after the last day of this present *Michaelmas* term, in every case wherein the same bail as have been already put in, or wherein other bail are intended to be added to the original bail put in, the names and descriptions or name and description of such same original bail intended to justify, or added bail to be put in and justify, shall be inserted in every notice of such same or added bail to be justified, or to be put in and justified pursuant to such notice; and that in default thereof in either of the cases aforesaid, no rule for the allowance of such same or added bail shall be drawn up.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

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IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

In the Seventh and Eighth Years of the Reign of
GEORGE IV.

TAYLOR v. COHEN.

Jan: 29.

THE Defendant and several others, creditors of one *Moss*, a bankrupt, having reason to apprehend some mal-practice, held a meeting, and came to the following, among other resolutions :

“ That the gentlemen present having reason to suppose that fraudulent demands have been and will be endeavoured to be made upon the estate, — resolved,

Several creditors of a bankrupt agreed to contribute in the usual way to the expence of watching the proceedings under the commission ;

by the *usual way* was meant, that each creditor should contribute to the expence in proportion to the amount of his claim. An attorney employed by all, having sued one of them for the amount of his contribution : Held, that another who had paid his share, was a competent witness to prove the Defendant's agreement.

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"That it is necessary by every means to endeavour to prevent the same:

"That the expences of the above be borne by the creditors present, or such as may hereafter come into these measures, *in the usual way*; but that any creditor be allowed to come in after the meeting of to-morrow under the commission."

The resolutions were signed by all the creditors present, except the Defendant, who agreed to them, but refused to sign when called on to do so, on the ground that it was the sabbath; he being a Jew; but of this circumstance the other creditors received no notice.

The Plaintiff having acted for the creditors under these resolutions, received from each a part of the amount of the bill, in proportion to their respective debts.

The Defendant's proportion was 24*l.* 4*s.*; but he having refused to pay, on the ground that he had never signed the resolution, this action was brought to compel him.

At the trial before *Gaselee J.*, *London* sittings after *Trinity* term last, one of the creditors who had paid his proportion of the bill was called to prove the Defendant's having agreed to the resolutions, and also to explain what was meant by paying "*in the usual way*," which he said was for each creditor to pay a part of the amount of the bill, in proportion to the amount of his claim against the bankrupt.

The testimony of this witness was objected to, on the ground that he had an interest in the event of the cause, inasmuch as the proportion he would have to pay of the Plaintiff's bill would be larger if he failed to establish the Defendant's liability.

The witness having been admitted, subject to the opinion of this Court on his competency, and a verdict having been found for the Plaintiff,

Vaughan

Vaughan Serjt. obtained a rule *nisi* for a new trial, on the above objection, relying on *Brown v. Brown* (a), where one of two defendants having suffered judgment by default, was not permitted to be a witness to charge the other defendant.

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vs
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Wilde Serjt. now shewed cause. In cases circumstanced like the present, the creditors who employ an attorney are not joint contractors to pay the whole of his bill, but each in effect makes a several engagement for his own proportion. The witness, therefore, was in nowise liable to pay the Defendant's proportion, even if the Plaintiff had failed to establish his case. Even if the witness be deemed a joint contractor, the verdict in this cause would be no evidence for him in case the Defendant should sue him for contribution; which distinguishes the case from *Brown v. Brown*, where the witness rejected on the score of interest was himself a defendant, and would have succeeded in obtaining contribution by the evidence with which it was sought to charge the other defendant. *Hudson v. Robinson* (b) is in point to shew that the witness was competent. There, in *assumpsit* against one of several partners who pleaded in abatement that the others ought to have been joined, one of the others was admitted as a witness to shew that the defendant had contracted individually, but had used the partnership style in fraud of the partners.

The same point was determined in *Cossham v. Goldney*. (c)

The Plaintiff in the present case having received from the witness the amount of his demand, could not afterwards turn round and require a further contribution, especially when acting for all the creditors he omitted to give notice of the Defendant's refusal to sign the agree-

(a) 4 Taunt. 752. (b) 4 M. & S. 475. (c) 2 Stark. N. P. C. 414.

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ment. By his acceptance of the witness's proportion, he impliedly released him from any further claim. Where several underwriters defend an action by one attorney, each stands on his own responsibility, and is not liable beyond his own share of the expence.

Vaughan. Even admitting that the witness was not a joint contractor with the Defendant, yet, by involving him in the same charge, he reduces the demand against himself and the other creditors: he was therefore interested, and ought to have been rejected.

BEST C. J. I think the witness was properly received in this case, because the plaintiff had no demand against him. The question turns on the language of the resolution, "That the expence be borne by the creditors present, or such as may hereafter come into these measures, *in the usual way.*" As the resolution does not explain what is meant by *the usual way*, we must resort to the parol evidence for the meaning of the expression; and we find that it is for each creditor to pay a part of the amount of the bill, in proportion to the amount of his claim against the bankrupt. On entering into such an undertaking, each of the creditors does not become responsible for the solvency of the others; for if so, few would attend the meeting: it was clearly the understanding of all parties, that each of them should become responsible for his own proportion of the expence. The witness, therefore, had no interest; he was liable only for his own share, and that the Plaintiff had received. The case is clearly distinguishable from that of *Brown v. Brown*, in which the witness was a joint contractor.

PARK J. The witness in the present case was not a joint contractor, nor in any way answerable for the Defendant's

fendant's share. The creditors agree to contribute to the expence of the proceeding, according to the proportion of their respective debts; and it would be hard if the witness should, in respect of his small debt, be responsible to the same extent as the Defendant in respect of his larger claim. In actions upon policies of insurance, where several underwriters subscribe for different sums, they commonly join in contributing to the expence of the defence; but if one of them should prove insolvent, the attorney does not come on the others for his share. In the present case each of the creditors was responsible for himself only.

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BURROUGH J. The parol evidence was received in this case, not to contradict, but to explain the written document; and when admitted, it turns out that paying in the *usual* way means that each creditor shall be responsible for his own share of the expence only; so that the witness, having paid his share, had no longer any interest, and was clearly competent.

GASELEE J. concurring, the rule was

Discharged.

BIRÈ v. MOREAU.

Jan. 31.

IN *July* a verdict in this cause was given for the Defendant. In *August* a commission of bankrupt was issued against the Plaintiff. In *Michaelmas* term the Plaintiff obtained his certificate. In the same term, but in *August*; judgment against him, and certificate under the commission, for him, in *Michaelmas* term ensuing: Held, that he was liable to an execution for costs, notwithstanding 6 G. A. c. 16. s. 56.

Verdict for
Defendant in
July. Com-
mission of
bankrupt
against Plain-

sub-

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subsequently to his obtaining the certificate, judgment was signed for the Defendant, and costs taxed, and shortly afterwards execution issued for the costs.

Taddy Serjt. obtained a rule *nisi* to set aside this execution, on the ground that the demand for the costs might have been proved under the commission, and was therefore barred by the certificate.

Upon the verdict being given, the Defendant's costs were a debt depending on a contingency (namely, the contingency of a motion for a new trial being made and refused), and as such might have been valued and proved under 6 G. 4. c. 16. s. 56.; that section having in effect prescribed a different rule from the rule laid down in *Walker v. Barnes* (a) and *Scott v. Ambrose*. (b)

Vaughan Serjt. shewed cause. The fifty-sixth section of 6 G. 4. c. 16. applies only where the bankrupt has "contracted any debt payable on a contingency." (c) The

(a) 5 *Taunt.* 778.

(b) 3 *M. & S.* 326.

(c) 6 G. 4. c. 16. s. 56. And be it enacted, that if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt; and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and re-

ceive his dividend with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.

Sect. 58. And be it enacted, that if any plaintiff in any action at law or suit in equity, or petition in bankruptcy or lunacy, shall have obtained any judgment, decree, or order against any person who shall hereafter become bankrupt, for any debt or demand in respect of which such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy.

COSTS

costs for which this execution was issued are not a debt contracted, but a payment to which the bankrupt has become liable *in invitum*; and section 58. applies only to the *Plaintiff's* costs. The statute, therefore, not applying to the *Defendant*, the case falls within the rule in *Walker v. Barnes*.

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 v.
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Taddy Serjt. Upon the verdict being given, the costs were an inchoate debt, for which, after judgment, the Defendant might have sued. He was entitled, therefore, to have it valued under the commission, like any other contingent debt, and could not resort to an execution.

BEST C. J. Although this is a hard case I think the act does not apply. The costs for which the Plaintiff is liable are not a *debt contracted* within the meaning of the fifty-sixth section. If upon verdict, the costs, as it has been argued, become an inchoate debt, the fifty-sixth section would have been altogether unnecessary.

PARK J. It has been admitted that, but for the 6 G. 4., this is a clear case, according to the decision in *Walker v. Barnes*. But the 6 G. 4. has not made any alteration. I cannot say that the costs for which the Defendant has obtained judgment are a debt *contracted* by the Plaintiff. There is no contract between the parties in respect of these costs. The fifty-eighth section provides only for costs obtained by the *plaintiff*, and entirely omits any mention of a defendant.

BURROUGH J. These costs do not arise out of any contract on a contingency. Such, for instance, as a policy of insurance. A loss occurring after the bankruptcy, in respect of such a contract, might perhaps be proveable under the commission. But neither on the spirit

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spirit or the words of the act can the Plaintiff be exempted from the present claim.

GASELEE J. concurred, and the rule was

Discharged.

Jan. 31.

MORRISON v. MUSPRATT and Others.

A female, upon whose life it was proposed to effect an insurance, was represented to the insurers in *December 1822* by *A.*, a medical man, as enjoying ordinarily a good state of health:

The same representation was repeated by *A.* in *March*, and the insurance was effected in *April 1823*:

Between *December 1822* and *March 1823* she had been

ill with a pulmonary attack, and was attended by *B.*, but no disclosure of these circumstances was made to the insurers:

In *April 1824* she died of pulmonary disease:

Held, on motion for a new trial, that the jury ought to have been called on to consider whether the illness in 1823, and the attendance of *B.*, ought to have been disclosed to the insurers, and that it was not sufficient to direct them generally, to consider whether or not there had been any misrepresentation.

Between

THIS was an action on a policy of insurance, executed by the Defendants on the life of a *Mrs. Elgie*.

At the trial before *Abbott C. J.*, *Lincoln Summer assizes 1826*, it appeared that for some years previous to *December 1822* *Mrs. Elgie* had been in a delicate state of health, exhibiting, particularly in the year 1821, symptoms which were thought to be phthisical; and having been in *October 1822* twice alarmingly ill, in *December 1822* *Mr. Boot*, a medical practitioner, who resided some miles off, and was not then in attendance upon her, but who had known her for many years, was sent for to examine her, with a view to the present insurance: he examined particularly the state of her lungs and liver, and finding them, as he thought, sound, certified to the Defendants that the ordinary state of her health was good. On the 19th of *March* following he gave another certificate to the same effect, upon which the insurance was effected in *April 1823*. *Mrs. Elgie* died of diseased lungs in *April 1824*.

Between *December* 1822 and the 19th of *March* 1823, she was attended by Mr. *Bland*, a medical practitioner who resided in her neighbourhood.

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She had a troublesome cough, and became much emaciated: her diet was regulated, with a view to add to her strength without increasing febrile symptoms and irritation, to which she was then subject in the evening; but Mr. *Bland* thought that disease of structure had not taken place.

When the insurance was effected, no communication was made of this illness or of the attendance of Mr. *Bland*.

The learned Chief Justice left it to the Jury generally to say, whether any misrepresentation had been made to the Defendants, but did not expressly call on them to consider whether the illness in *January* and *February* 1823, and the attendance of Mr. *Bland*, ought to have been communicated before the insurance was effected.

A verdict having been found for the Plaintiff,

Wilde Serjt. in the last term obtained a rule *nisi* for a new trial, on the ground that there had not been so full a disclosure to the Defendants of Mrs. *Elgie's* situation as they were entitled to receive.

Vaughan and *Taddy* Serjts., who shewed cause, contended that all which it was material for the Defendants to know was, the condition of the life at the time of the insurance, and that there was no evidence to shew that Mrs. *Elgie* was not in good health on the 19th of *March* and the 23d of *April*. Provided her health was re-established at the time of the insurance, the knowledge of her previous condition could be of no importance to the Defendants.

Bosanquet

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MURFATT.

Bosanquet Serjt. in support of the rule, argued that if the Defendants had been made acquainted with the previous illness, they might have been deterred from the insurance by the apprehension of a relapse; and he cited *Carter v. Boehn* (a), *Bufe v. Turner* (b), and *Fitzherbert v. Mather* (c), to shew that an insurance is a contract *uberrimæ fidei*, and that it is avoided by the suppression of any circumstance which may assist the insurer towards forming a correct judgment.

BEST C. J. Whether or not it was material for the Defendants to have been made acquainted with the fact which has been withheld from their knowledge, is a question for the jury. It is probable, however, it would be esteemed material, because all insurance offices are desirous to consult with the medical man who has been last in attendance on the life insured.

I think, therefore, there should be a new trial on payment of costs, as the attendance of *Bland* on Mrs. *Elgie* was not disclosed to the insurers.

BURROUGH J. Advantage ought not to be taken of the omission of trifling circumstances. But the attendance of *Bland* on Mrs. *Elgie* ought to have been brought to the attention of the jury, to decide whether or not it ought to have been disclosed to the Defendants.

GASELEE J. We do not lay it down as a rule, that the omission to bring to the consideration of the jury any single circumstance shall in all cases of this nature afford a ground for a new trial; but if the Defendants in the present case had known of the attendance of a medical man from *January* to *March* before they signed the policy, it is probable they would have paused or

(a) 3 Burr. 1905.

(b) 2 Marsh. 47.

(c) 1 T. R. 12.

have

have altered their terms. The jury, therefore, ought to have considered the materiality of that circumstance, and the Defendants are entitled to make the present rule

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v.
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Absolute.

EVANS v. BIDGOOD.

Feb. 1.

THE Defendant was arrested in *Devonshire* on the 23d November 1826 on a *testatum capias* directed to the sheriff of *Devon*, dated November 6, 1826, returnable in eight days of *Hilary*, and reciting a *capias* to the sheriff of *Cambridgeshire* "at a certain day now past, returned to our justices at *Westminster*."

This writ was indorsed, "Oath for 2000*l.* Affidavit filed in *Cambridgeshire*, 17th November 1826."

A *præcipe* into *Cambridgeshire* had been filed with the filacer of the county of *Cambridge* on the 17th November, returnable in fifteen days of *St. Martin*. But no original had been returned and filed with the filacer for that county, and no affidavit or *præcipe* had been filed with the filacer of the county of *Devon*, in or as of *Michaelmas* term last. The affidavit into *Cambridgeshire* was for 1345*l.* 7*s.* 6*d.* due on bond, and for 650*l.* 12*s.* 6*d.* for money lent.

Upon an affidavit stating these facts,

Bosanquet Serjt. moved for a rule *nisi* to discharge the Defendant, and set aside the proceedings on the arrest,

Where the demand is made up of several items, it is sufficient to indorse the total of them on the writ.

Where the Defendant was arrested on a *testatum capias* into *Devonshire*, without any affidavit filed on issuing the *testatum capias*, an affidavit having been filed on issuing a previous *capias* into *Cambridgeshire*: Held, regular, though the *testatum* was not tested on the *quarto die post* of the original; the filacer for *Cambridgeshire* being the proper officer to issue writs into *Devonshire*.

upon

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upon the Defendant's filing common bail. He objected that an affidavit on a *capias* would not support a second writ, unless the second writ were founded on the first; *Dorville v. Whoomwell* (a); that the *testatum capias* in the present instance was not founded on the *capias*, because it was not tested on the *quarto die post* of the original writ. The affidavit, therefore, was sworn before the wrong officer, and was of no avail. *Dalton v. Barnes*. (b) It might not be necessary for the Plaintiff to issue an original in the first instance; but having done so, and founding his proceedings upon it, they could not be supported unless they were regular.

He also objected that under the 12 G. 1. c. 29. a plaintiff is not to have the benefit of an arrest unless the sum or sums due to him are indorsed on the writ, and that though it might not be necessary in an arrest upon a balance of an account to set out all the items of the account, yet where the demand was on a bond, and for money due on simple contract, the indorsement should specify the amount of each.

A rule *nisi* was granted, against which

Wilde Serjt. shewed cause, and with respect to the first objection relied on *Anderson v. Hayman* (c), where the Defendant having been arrested upon a *capias* directed to the sheriff of *London*, which issued upon an office copy of an affidavit of debt sworn before the filacer for *Devon*, and no affidavit was made before the filacer for *London*, it was holden that the proceedings were regular. In *Dalton v. Barnes* the affidavit was not filed with the proper officer; but the filacer for *Cambridgeshire* is the proper officer for issuing writs into *Devon*. In answer to the second objection he cited *Boyd v.*

(a) 3 Bingb. 39.

(b) 1 M. & S. 230.

(c) 8 Taunt. 242.

Durand (a), where it was held not necessary for the instructions to the filacer to contain a clause *ac etiam*.

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Bosanquet. In the present case no office copy of the first affidavit was used, as in *Anderson v. Hayman*.

BEST C. J. In the Court of King's Bench *latitans* have issued for ages without a previous bill of *Middlesex*, on which they are supposed to be grounded; so in this Court writs of *capias* have always issued without a previous original, which, in case of outlawry, we allow to be supplied at any time; and we should do so here if it were necessary, which, however, is not the case. The decisions in which a second affidavit has been required, are cases in which the first has not been filed with the officer who issued the second writ; but here the filacer for *Cambridgeshire* is the officer who issued the *testatum* into *Devon*. With regard to the second objection, this is the first time it has been taken since the passing of the statute. The language of the act, however, enables the party to comprise the demand in one amount, as well as to set out the separate items, and the practice has always been conformable to this construction. If the sums amount to more than 10*l.* the sheriff is bound to arrest, and the amount may be stated in one total.

PARK J. In *Dorville v. Whoomwell* the first *capias* issued on an affidavit filed with a filacer of one county, and the second was issued without any affidavit for the filacer of the second county. But here the filacer for *Cambridgeshire* was the proper officer to issue the *testatum* into *Devon*, so that there was no reason for a second affidavit.

There is no weight in the second objection. It has been the constant practice, and is quite sufficient under

(a) 2 Taunt. 161.

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the statute, to combine all the items of the demand in one total as the sum for which the sheriff is to make the arrest.

BURROUGH J. The only object of the act was to instruct the sheriff as to the amount for which he is to make the arrest. There is no ground for the first objection.

GASELEE J. The first objection is answered by the fact that the affidavit has been filed with the proper officer. The second objection cannot be supported. The only object of the indorsement on the writ is to inform the sheriff of the amount for which he is to require bail.

Rule discharged.

Feb. 5.

ADAMSON v. JARVIS.

Where the Plaintiff, an auctioneer, sold goods under order of the Defendant, who had no right to dispose of them, and the true owner afterwards

A VERDICT was entered for the Plaintiff upon a count which stated, that Defendant on the 18th of April 1817, to wit, at London, was possessed of divers cattle, goods, and chattels of great value, to wit, of the value of 1100*l.*, and being so possessed thereof, afterwards, to wit, on, &c. at, &c. represented and affirmed to Plaintiff that he Defendant was legally and of right entitled to sell and dispose of said cattle, recovered against the Plaintiff; a declaration in case, which alleged that the Defendant being possessed of the goods, represented to the Plaintiff that he was entitled to dispose of them; that the Plaintiff in consequence, at the Defendant's request, sold them by auction, and, after deducting certain charges for his trouble, paid the residue of the proceeds to the Defendant; that the Defendant deceived the Plaintiff in this, that he was not at the time of the sale entitled to dispose of the goods; that the true owner afterwards recovered the value of the Plaintiff, and that the Defendant refused to reimburse him: Held sufficient after verdict.

goods,

goods, and chattels, and then and there requested Plaintiff to put up and expose the same to sale by public auction for him Defendant; that Plaintiff, confiding in the said representation and affirmation of Defendant, and believing the same to be true, and not knowing to the contrary thereof, did afterwards, to wit, on, &c. at, &c. put up and expose to sale by public auction the said cattle, goods, and chattels, and then and there sold the same to divers persons there then assembled for the purchase thereof, for a large sum of money, to wit, the sum of 601*l.* 2*s.* 9*d.*; and Plaintiff, after deducting and paying thereout divers sums of money which he Plaintiff was entitled to deduct and bound to pay thereout, amounting in the whole to a large sum of money, to wit, the sum of 187*l.* 18*s.* 11*d.*, paid over the residue thereof, to wit, the sum of 413*l.* 3*s.* 10*d.* to Defendant; whereas in truth and in fact Defendant deceived and defrauded Plaintiff in this, to wit, that Defendant was not at the time of the said sale legally or of right entitled to sell and dispose of the said cattle, goods, and chattels, or of any part thereof, to wit, at *London* aforesaid.

Plaintiff further said, that afterwards, to wit, on the 16th of *May* 1822, at *Westminster*, to wit, at, &c. before the Right Honourable Sir *Robert Dallas* and his companions, then being his present majesty's justices of the Bench, there, to wit, at, &c. one *Joseph Somersett*, as the true and lawful owner of the said cattle, goods, and chattels at the time they were so exposed to sale as aforesaid, brought a certain action against Plaintiff to recover the value of said cattle, goods, and chattels so sold by Plaintiff as aforesaid, and such proceedings were thereupon had in the said action that the said *Joseph Somersett* afterwards, to wit, in *Trinity* term in the third of the reign of his said present majesty, before the said justices of the bench at *Westminster* aforesaid, to wit, at, &c., by the consideration and judgment

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of the said Court recovered against Plaintiff a large sum of money, to wit, the sum of 1100*l.* as and for the value of the said cattle, goods, and chattels so sold by Plaintiff as last aforesaid, and the further sum of 95*l.* for costs and charges by *Somersett* about his said suit in that behalf expended, making together the sum of 1195*l.* as by the record and proceedings thereof still remaining in the said Court at *Westminster* aforesaid more fully appears, to wit, at, &c.

That afterwards, to wit, on the 23d of *November*, in the year last aforesaid, at *London* aforesaid, he Plaintiff was forced and obliged to pay, and then and there did pay, to said *Joseph Somersett* the said sum of 1195*l.*, and was also then and there forced and obliged to lay out and expend a certain other large sum of money, to wit, the sum of 500*l.* in and about defending the said action so brought against him as last aforesaid, and in and about taking and pursuing other necessary proceedings made incumbent upon him in consequence of the said sale and the said recovery; of all which premises the said Defendant afterwards, to wit, on, &c. at, &c. had notice, and then and there ought to have paid and satisfied to Plaintiff the said sums of money which he Plaintiff was so forced and obliged to pay, lay out, and expend as aforesaid, and was then and there requested by Plaintiff to pay him the same; nevertheless Defendant not regarding his duty in that behalf, but intending and contriving to defraud and injure Plaintiff in this respect, did not nor would (although often requested) pay or satisfy to Plaintiff the said sums of money above mentioned, or any or either of them, or any part thereof, but hath hitherto wholly refused, and still doth refuse so to do, and the same and every part thereof still remain wholly due and unpaid to Plaintiff.

Taddy Serjt. in the last term moved for a rule *nisi* in arrest of judgment, on the ground that the count was

ill

ill conceived. It was neither *ex contractu* nor *ex delicto*. There was no retainer of the Plaintiff by the Defendant stated, no employment of him for reward, no promise on either side to raise an assumpsit; and there was no allegation of fraud, of malicious misrepresentation, — no *scienter*, — to constitute a tort; on the contrary, whatever might have been the case at the time of the sale, at the time of the representation it appeared that the Defendant was lawfully in possession of the property in question. *Haycraft v. Creasy*(a) was an express decision to shew that an action of tort would not lie unless the misrepresentation complained of were wilful, and intended to deceive.

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Wilde Serjt. contra. Enough is stated on this count to warrant a judgment against the Defendant, after verdict. The representation that the Defendant was entitled to sell, amounts to an express warranty to save the Plaintiff harmless: it would have been a warranty to a purchaser, and is equally so to an agent. Where there is an express warranty, it is not necessary to aver that the Defendant knew it to be false, or that he intended to defraud. It is sufficient if the Defendant be alleged to have stated as true that which he had not ascertained to be so. Even, however, if deceit were necessary to impose liability, deceit is here sufficiently averred in the allegation that the Defendant by his representations deceived and defrauded the Plaintiff, and the receipt by the Defendant of the proceeds of the sale is conclusive to shew that he persisted in his misrepresentation to the last. *Crosse v. Gardner* (b) is in point for the Plaintiff. In that case the defendant had affirmed that certain oxen which he sold to the plaintiff were his, when in fact they belonged to another person.

(a) 2 East, 92.

(b) Carth. 90.

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It was there objected, as in the present case, that the declaration neither stated that the defendant *deceitfully* sold them, nor that he *knew* them to be the property of another person; and yet it was holden that the action lay. That case (with others to the same effect in 1 *Roll. Abr.* 95. *Cro. Jac.* 474.) was confirmed in *Pasley v. Freeman* (a), where the defendant was held liable for the consequences of a fraudulent misrepresentation, although he derived no benefit from it. In the present case the Defendant reaped all the profit he proposed by the misstatement he made to the Plaintiff.

Taddy. No contract between the Plaintiff and Defendant is stated on the record; they must, therefore, be both considered as joint tort feasers, and the present action as nothing else but an attempt by one tort feaser to recover contribution from another, which the law does not permit. In all the cases cited there was a contract between the parties; as in *Crosse v. Gardner*, where the defendant sold the oxen to the plaintiff; in 1 *Roll. Abr.* 95. and *Cro. Jac.* 425., where an agent sold lands to the plaintiff under an express warranty. In the present case there is no contract between the Plaintiff and Defendant, but only a request made to the Plaintiff by the Defendant to commit a trespass. But the declaration ought to have shewn either a breach of contract, or a false affirmation made with intent to deceive. A declaration on a tort arising out of a contract ought always to shew that a contract existed between the parties, *Max v. Roberts.* (b) And a declaration on a false representation ought at least to allege a *scienter*; *Pasley v. Freeman*, *Haycraft v. Creasy*. If a declaration such as the present be held sufficient, every tort feaser may recover compensation against his companion.

(a) 3 *T. R.* 51.(b) 12 *East*, 89.

The Plaintiff ought to have required a bond of indemnity of the Defendant before he proceeded to sell.

Cur. adv. vult.

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BEST C. J. A motion has been made in arrest of judgment *after verdict*. The Plaintiff relies on the second count, on which only his verdict and judgment are to be entered.

Stripped of the technical language with which it is encumbered, the case stated on the second count is this: that the Defendant having property of great value in his *possession*, represented to the Plaintiff that he had authority to dispose of such property; and followed this representation by a request, that the Plaintiff would sell the property for him, the Defendant. The Plaintiff, believing the representation of the Defendant as to his right to the property, and not knowing, either at the time the representation was made, or at any time after, that it was not his, as the agent of the Defendant, sold the property; and after paying such sums out of the proceeds as he was bound to pay, and making such deductions as he had a right to make, and which the Defendant appears to have allowed, paid the residue to the Defendant.

The Defendant, who had induced the Plaintiff to make this sale by his false representation and request to sell, and who, after the sale, continued to assert his right to sell, and confirmed the agency of the Plaintiff by accepting from him the residue of the proceeds of the sale, had no right to dispose of this property. The consequence has been, that the Plaintiff, supposing, from the Defendant's false representations, he had an authority which he had not, and, acting as the Defendant's agent, has rendered himself liable to an action at the suit of the true owner of the goods, and has been obliged to pay

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damages and costs, whilst the Defendant, the sole cause of the sale, quietly keeps the fruits of it in his pocket.

It has been stated at the bar that this case is to be governed by the principles that regulate all laws of principal and agent:—agreed: every man who employs another to do an act which the employer appears to have a right to authorise him to do undertakes to indemnify him for all such acts as would *be lawful* if the employer had the authority he pretends to have. A contrary doctrine would create great alarm.

Auctioneers, brokers, factors, and agents, do not take regular indemnities. These would be indeed surprised, if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrong-doers, and could not recover compensation from him who had induced them to do the wrong.

It was certainly decided in *Merryweather v. Nixon* (a), that one wrong-doer could not sue another for contribution; Lord *Kenyon*, however, said, “that the decision would not affect cases of *indemnity*, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.” This is the only decided case on the subject that is *intelligible*.

There is a case of *Walton v. Hanbury and others* (b), but it is so imperfectly stated, that it is impossible to get at the principle of the judgment.

The case of *Philips v. Biggs* (c) was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of *Middlesex*, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors.

From the inclination of the Court on this last case, and from the concluding part of Lord *Kenyon*'s judg-

(a) 3 T. R. 186.

(b) 2 Vern. 592.

(c) Hardr. 164.

ment in *Merryweather v. Nixon*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

If a man buys the goods of another from a person who has no authority to sell them, he is a wrong-doer to the person whose goods he takes; yet he may recover compensation against the person who sold the goods to him, although the person who sold them did not undertake that he had a right to sell, and did not know that he had no right to sell. That is proved by *Medina v. Stoughton (a)*, *Sanders v. Powel (b)*, *Crosse v. Gardner (c)*, and many other cases.

These cases rest on this principle, that if a man, having the possession of property which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when in point of fact the affirmant is not the owner, he is liable to an action.

It has been said, that is because there is a breach of *contract* to rest the action on, and that there is no contract in this case. This is not the true principle: it is this; he who affirms either *what he does not know to be true*, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages.

But here *is* a contract: the Plaintiff is hired by Defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale.

The above-cited cases shew that a *scienter* is not necessary in this case, although it was necessary in the case of *Haycraft v. Creasy* and the cases of that class.

(a) 1 Salk. 210.
(b) 1 Lev. 129.

(c) Carth. 90. 1 Roll. Abr.
91. l. 5.

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In these cases, a party who had no interest was applied to for his opinion; if he gave an honest, although mistaken one, it was all that could be expected.

But it has been said, you have not shewn that the affirmation *was false at the time it was made*; for the breach is not, that Plaintiff had not authority to sell at the time he said he had, but at the *time of the sale*, which was subsequent.

But the complaint is, that Defendant affirmed he had power to sell, and followed that affirmation by a request to sell; which affirmation and request induced Plaintiff to sell when Defendant had no right to give him authority to make such sale. This affirmation and request caused the Plaintiff to do an act which has been injurious to him and beneficial to the Defendant.

For this injury Plaintiff is entitled to compensation, whether the affirmation was false or true at the time it was made.

If Defendant had *authority* to sell at the time he employed Plaintiff, but *ceased* to have that authority at the time of the sale, he should have informed Plaintiff of this change in his situation, and prevented him from doing what he ought not to have done; at all events, he should *not have taken the proceeds of the sale*.

If after verdict we can collect a cause of action, or infer that proof must have been given at the trial, that will support the action, and the judgment may be sustained.

In *Weston v. Mason (a)*, which was an action on a bond brought against the sureties of the sheriff's bailiff, the condition recited that the sheriff had appointed the bailiff for the hundred of *East Gotson*, and it did not appear that the warrant which he was charged not to have returned was directed to him *as bailiff of that*

(a) 3 Burr. 1725.

hundred;

hundred; but the Court said that, being in arrest of judgment, as it did not appear that it was *not* directed to him as bailiff of that hundred, which the *Defendant might have shewn*, it was sufficient. In *Bull v. Steward (a)*, in an action against the bailiffs of the borough for an escape, it did not appear that the cause of action arose within the *jurisdiction* of the Court; but it was held that after verdict the *Court would presume any thing proved at the trial which was necessary to be proved*, unless the contrary appeared on the face of the record.

On these authorities the Court might say, as the Defendant has not shewn that he was authorized to sell at the time he affirmed he was, and as it is proved he was not authorized at the sale, we will presume that he never had authority *at any time*. But the main ground is, that he has created a belief in the Plaintiff that he had authority when he clearly had no authority.

Mar v. Roberts, which has been cited, does not apply: it did not appear that Defendant had ever undertaken to carry the goods, and therefore he could not be answerable for taking them out of the due course of the voyage.

Rule discharged.

(a) 1 *Wils.* 255.

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The Mayor and Burgesses of STAFFORD v. TILL.

Feb. 7.

THE Plaintiffs sued the Defendant in *assumpsit* for the use and occupation of a tenement held under them, and for which the Defendant had previously paid rent to the corporation.

At the trial before *Burrough J.*, last *Stafford* Summer assizes, a verdict was found for the Plaintiffs, with leave

A corporation aggregate may sue in *assumpsit* for use and occupation where the tenant has held premises under them, and paid rent.

for

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 accordingly,
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Peake Serjt. last term moved for a rule *nisi*, on the ground that a corporation could not demise except by deed; and, consequently, could not sue in *assumpsit*.

D'Oyly Serjt. shewed cause. Though *assumpsit* does not lie against a corporation, it lies for it. It is true, a corporation cannot be bound except by deed, but it may sue in debt for the use of lands which have been holden without deed: *Dean and Chapter of Rochester v. Pearce* (a): and the principle laid down in that case includes an action of *assumpsit* as well as debt. In the *East India Company v. Glover* (b), *assumpsit* was brought by a corporation upon a sale of coffee. In the *Barber Surgeons of London v. Pelson* (c), a corporation sued in *assumpsit*, and no objection was taken to the form of action. The statute 11 G. 2. c. 19. s. 14. gives the landlord an action on the case where the demise is not by deed; and the doubt originally was, whether debt would lie on that statute: *Stroud v. Rogers* (d) [*Gaselee J.* referred to *Mayor of London v. Goree* (e), *Mayor of London v. Hunt*. (f)].

Peake. Of the cases cited, the *Barber Surgeons of London v. Pelson* is the only one on which the objection was taken, and the point decided. But in *Rex v. Chipping Norton* (g) and *Rex v. Duffield* (h), it is expressly laid down that a corporation cannot demise except by deed; and if there be no valid demise there can be no action.

Cur. adv. vult.

(a) 1 *Campb.* 466.

(b) *Str.* 612.

(c) 2 *Lev.* 252.

(d) In a note to *Wilkins v. Wingate*, 6 T. R. 62.

(e) 1 *Ventr.* 298.

(f) 3 *Lev.* 37.

(g) 5 *East*, 239.

(h) 3 M. & S. 247.

BEST C. J.. The question to be decided in this case is, whether a corporation aggregate can sue, in an action for use and occupation, a tenant who has occupied lands of the corporation without deed. Where a party has occupied land, the contract between him and the landlord must be considered as executed, so that there is no necessity for alleging in the declaration any express promise to pay : from the fact of occupation, a promise to pay will be implied : although in an executory contract the Plaintiff must rest his case upon an express promise : and where that is so, if one of the parties is not in a condition to enter into a promise, he cannot take advantage of a promise by the other, because there would be no mutuality in the contract. We do not decide, therefore, that a corporation could sue in *assumpsit* on every express promise, because if the contract were executory there might be no mutuality of benefit, and consequently no consideration. But in the present case, the land having been enjoyed by the Defendant, the promise to pay for it is implied, and there is a good consideration for the promise. The point, however, has been decided in the *Barber Surgeons of London v. Pelson*. That was an action to recover 20*l.* forfeited by the Defendant, under the bye-laws of a company to which he belonged. It was insisted that an action would not lie for money forfeited under a bye-law, and that a promise could not be made to a corporation aggregate except by deed. But the Court overruled the objections, and said, that they had been overruled in the *Mayor of London v. Goree*. Judgment was accordingly given for the Plaintiff in both cases.

The case of the *Mayor of London v. Hunt* (a) is also to the same effect, where, though it does not appear that the precise point was raised, it was held that *assumpsit*

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would

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would lie for a corporation on an implied promise. Here there is an implied promise sufficient to raise an obligation between the two parties.

The point occurred again in 3 *Lev.*; the question, however, was not raised, the point being considered as settled. But the *Dean of Rochester v. Pearce* is an express authority in favour of the Plaintiff. The form of the action, indeed, in that case, was debt; but there is no substantial difference between the two cases; and the opinion of the judge at *Nisi Prius* was confirmed by the judgment of the full Court.

If a promise could not be implied, an action for use and occupation could never be brought by a corporation. But the law will imply not only a promise, but an existing tenancy in those who hold the land of a corporation. In *Wood v. Tate* (a) the Court said, the plaintiff having enjoyed the premises, they would consider him as tenant from year to year. And the same point is to be found in *Vin Abr. Corporation*, K. 11. 41.

The two sessions cases which have been referred to do not break in upon this principle; the last of them, indeed, confirms it. In the first, *Rex v. Chipping Norton*, where a corporation by oral agreement with a pauper leased to him the tolls of a market, the Court held that he could not thereby gain a settlement, as such an interest could not pass except under the seal of the corporation. But the second case turned expressly on the difference between corporeal and incorporeal property. The Court explained the ground of its former opinion; and Lord *Ellenborough* said, "The tolls are not things which lie in tenure, but only in grant; therefore, without a deed, an interest in them could not pass." The present, therefore, being a case in which it was not necessary to prove an express promise, but the contract

(a) 2 *N. R.* 247.

having been executed, and the Defendant bound in justice to pay for his occupation, the law will raise a mutual obligation upon which the Plaintiffs are entitled to sue. The rule, therefore, for entering a nonsuit or for arresting judgment must be

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Discharged.

PARKER, Demandant; PARKER, Tenant.

ONE of the cognizors, who, in the *præcipe* and concord, was called *Elizabeth Baylis*, had signed her name *Elizabeth Parker Baylis*. Upon an affidavit, that *Elizabeth Baylis* and *Elizabeth Parker Baylis* were the same person; that the mistake was not discovered till after execution; and that one of the cognizors (sixteen in number) was dead,

Bosanquet Serjt. moved that the fine might pass. But though

The Court admitted that the fine might pass as to the others, they said it could not pass as to *Elizabeth Baylis*.

Where one of sixteen cognizors in a fine signed her name *E. P. B.*, whereas her name was *E. B.*, the Court would not, upon an affidavit of identity, that the mistake was not discovered till after execution, and that one of the sixteen cognizors was

dead, allow the fine to pass as to *E. B.*

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SHAW v. CASH.

Where a bankrupt was about to be taken in execution, the Court would not, upon an affidavit which omitted to state where the commission was sued out, or where the commissioners resided, enlarge till a month after his final examination, the time for the bail's surrendering him.

THE Defendant had been arrested on the 3d of November last, had justified special bail and pleaded, and the Plaintiff was now within a day or two of arriving at execution. A commission of bankrupt, however, had issued against the Defendant on the 22d of January, the final meeting under which was fixed for the 13th of March ensuing.

Upon an affidavit stating these facts; that the bail would immediately surrender the Defendant, unless the Court enlarged the time for surrendering; that the application was made with the consent of the bail; and that the Defendant, if taken in execution, would not be able to enter upon his examination,

Adams Serjt. obtained a rule *nisi* for enlarging the time for the Defendant's surrendering himself in discharge of his bail, till one month after he should have finished his examination under the commission of bankrupt: he cited *Maude v. Jowett* (a) and *Glendining v. Robinson*. (b)

Cross Serjt., who shewed cause, said the Court would only do this where it could be done without prejudice to the Plaintiff, and where it was inconvenient for the commissioners to examine the bankrupt. That the Defendant had made no allegation of any such inconvenience. That the commissioners might, under 6 G. 4. c. 16., postpone the bankrupt's last examination for three months,

(a) 3 *East*, 145.(b) 1 *Taunt.* 320.

and

and that during such an interval, the bail might become bankrupt also. He distinguished the cases cited.

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Adams having been heard in support of his rule,

The Court thought the affidavit did not disclose sufficient ground for the indulgence prayed. It did not state where the Defendant lived, or where the commission was sued out, and the bail might not be solvent after a lapse of three months. In *Maude v. Jowett*, the commissioners lived at *Wakefield*, so that the bankrupt could not have been brought up without great inconvenience.

Rule discharged.

STOVELD and Another v. EADE.

Feb. 7.

WILDE Serjt. had obtained a rule *nisi* to set aside a judgment entered up on a warrant of attorney, and an execution under a *fi. fa.*, on the ground, among other objections, that the warrant of attorney had been given on a usurious consideration. Cause being shewn by

A. having a bill for 2500*l.* at two months' date, which he could not readily negotiate in *London*, requested *B.* to give him in exchange an acceptance of *B.*'s *London* banker at the same date, and for the same sum.

Bosanquet Serjt., the facts as to that point appeared on affidavit as follows:

William Stoveld, a banker at *Petworth*, one of the Plaintiffs, on the 5th of *December* 1822, being in *London*, met *W. Upton*, who produced a bill of exchange for 2500*l.*, drawn by *Upton* upon and accepted by the Defendant and one *W. Eade*, payable two months after date.

B. did so, deducting 16*l.* 10*s.* for commission: Held, *no* usury.

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Upton requested Plaintiff to give *Upton* Plaintiff's bill on his *London* bankers in exchange.

Plaintiff being then much concerned with *Upton* as a timber merchant, and believing the Defendant to be solvent, consented to accommodate *Upton* in the manner proposed, and for that purpose drew a bill in the name of Plaintiff and his partner on their *London* bankers, at two months' date, for 2483*l.* 10*s.*, and having procured it to be accepted, delivered it to *Upton*, in exchange for the 2500*l.* accepted by the Defendant. The difference between 2483*l.* 10*s.* and 2500*l.* (16*l.* 10*s.*) he deducted for his trouble, and for the accommodation thus afforded to *Upton*; the interest upon 2500*l.* for two months, at 5 *per cent.*, would, if deducted, have amounted to 22*l.* 5*s.*

The bill for 2500*l.* not having been paid when due, the Plaintiff, after nine months' forbearance, took of the Defendant the warrant of attorney upon which execution had now been issued.

Bosanquet contended that there was no loan, but merely an exchange of a country bill at two months for a town bill at two months, for the convenience of which exchange the Plaintiff had charged 16*l.* 10*s.* by way of commission, being much less than the legal interest. Whether or not a transaction should be deemed a loan must depend on all the circumstances of the case, *Hammett v. Yea* (a), and there was nothing in the present arrangement to give it that complexion.

Wilde and *Spankie* Serjts., in support of the rule, insisted that the transaction was a loan; and that as *Upton* would have been obliged to pay at the rate of 5 *per cent.* to get the *London* bill at two months discounted, the

(a) 1 B. & P. 144.

16*l.* 10*s.* which he paid beyond that must be deemed a usurious payment.

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BEST C. J. I have no doubt on this case. . *Upton* being in possession of a bill which he could not readily negotiate in *London*, asks the Plaintiff for an acceptance of his *London* bankers in exchange. The Plaintiff consents to accommodate him, but demands something for the trouble and risk. If he had required more than 5 *per cent.*, it might have been thought that the exchange was only colourable, and that the real design was to exact usurious interest; but as less than 5 *per cent.* was taken, and the transaction was evidently for the accommodation of *Upton*, there is no pretence for calling it a loan, or for contending that it falls within the provisions of the statutes against usury. As to this point, therefore, the rule must be discharged.

PARK J. The Plaintiff takes less than 5 *per cent.* for his commission upon the exchange of the bill, and had a right to make a reasonable charge for the trouble and risk of bringing up funds from the country to meet his banker's acceptance. The affair was a mere exchange, and not a loan.

BURROUGH J. The case cited was much stronger than the present, for the Plaintiff took the full discount upon a four months' bill, and paid some part of it in bills at thirty days sight. But this was holden not to be usurious, because something might be allowed for the expence of remitting money from the country to *London*.

GASELKE J. concurred in thinking that the case had no approach to usury, and thereupon, as to this point, the rule was

Discharged.

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Feb. 9.

THOMAS SMITH v. F. and R. SPARROW.

An action will not lie on a contract entered into on a *Sunday*, although entered into by an agent, and although the objection is taken by the party at whose request the contract was entered into.

THIS was an action to recover damages for a breach of contract, in not accepting certain nutmegs which the Defendants were alleged to have purchased of the Plaintiff for 4613*l.* 15*s.* 5*d.*

At the trial before *Best C. J.*, *London* sittings after *Michaelmas* term last, the case appeared as follows:

The Plaintiff had given instructions to his brother, a broker, to purchase nutmegs for him, and to sell at any profit. Accordingly, on *Saturday*, *Feb.* 26. 1825, the broker purchased for his brother the nutmegs in question, some at 11*s.* and some at 11*s.* 3*d.* On *Sunday* the 27th, the broker called on *F. Sparrow*, one of the Defendants, and agreed to sell him all the nutmegs at 11*s.* 3*d.* The broker objected to deliver the contract until the following day; but, upon the pressing importunity of the Defendant, *F. Sparrow*, delivered to him on the *Sunday* night the following contract-note:

Messrs. *F. and R. Sparrow*,

We have this day bought for your account, twenty-six lots nutmegs, *per Sibbald*; thirteen ditto ditto, *per Phœnix*, at 11*s.* 3*d.* Deposit, 20*l.* *per* lot. Prompt, 16th *March*. Brokerage, $\frac{1}{2}$ *per cent.*

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The brokerage was paid by the Defendants. The broker also made, on *Sunday*, the following entry in his contract book:

"*F. and R. Sparrow* bought of twenty-six lots of nutmegs, *per Sibbald*; and thirteen lots, *per Phœnix*, at 11*s.* 3*d.*" On *Monday*, he said, he filled up

up the blank with the name of *Thomas Smith*; and at the same time the entry was copied into the waste book. This was before he had seen his brother, or communicated the contract to him. The sold note, he said, he delivered to the Plaintiff two or three days afterwards, or at least within a week, but he made no entry of it in his books, because the goods had been first purchased on the Plaintiff's account.

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On the *Wednesday* after the 26th, *F. Sparrow* called on the broker, and ordered him not to sell again till the price rose to 12s. 6d. The invoice was sent to the Defendants some time afterwards, and no objection was made. They did not know till the day of prompt who was the proprietor of the nutmegs at the time of the sale: subsequently they refused to fulfil the contract.

Best C. J. thought, that, as the sold note was not delivered to the Plaintiffs till some days after the bought note was delivered to the Defendants, there was no mutuality in the contract, and therefore directed a non-suit. An objection to the validity of the contract, on the ground of its having been entered into on a *Sunday*, was also reserved for the opinion of the Court.

Wilde Serjt. obtained a rule *nisi* to set aside this non-suit, against which

Vaughan and *Adams* Serjts. now showed cause, and relied principally upon the 29 *Car. 1. c. 7.*, by which it is provided that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the *Lord's-day*, or any part thereof, works of necessity and charity only excepted. They also cited *Fennell v. Ridler* (a) to show that the statute applies to transactions conducted in private as well as in public.

(a) 5 B. & C. 406.

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Wilde and Sparkie Serjts., contra, contended, first, that the contract, although commenced on the *Sunday*, was not completed till the *Monday*, when *Smith's* name was entered in the ledger. The entry on that day might, for the purpose of completing the contract, be connected with the conversation on the previous day, in the same manner as in *Saunderson v. Jackson (a)* a letter written subsequently to the delivery of a bill of parcels was connected with the prior order, so as to exempt the transaction from the operation of the statute of frauds. In *Bloomsome v. Williams (b)*, the transaction, though commenced on *Sunday*, not having been completed till the *Tuesday*, the statute was holden not to apply. But even if it should be deemed to apply under the circumstances of this case, it was an objection of which the Defendants could not take advantage, because whatever was done on the *Sunday* was done at their instigation and request. If they had done wrong, they could not take advantage of their own wrong to defeat their own contract.

As to the supposed want of mutuality, the bargain having been effected by a broker, who was agent for both parties, it did not await the assent of either to render it effectual against the other. And the illegality of his conduct, supposing the bargain to have been made on *Sunday*, though it might subject him to the penalties of the statute, did not avoid a contract which his authority ordered him to effect in a legal manner.

BEST C. J. It is not necessary to settle the degree of blame on one side or the other, where both parties are *in pari delicto*; but I wish that no parties concerned in contracts such as this could be heard in a court of justice. They are the worst and most detestable species of gamblers; and if those who formerly wrote on poli-

(a) 2 B. & P. 238.

(b) 3 B. & C. 232.

tical economy had lived to see these things, they must have retracted many of their opinions. It is true that individuals cannot, for any length of time, keep the price of articles of commerce at an artificial amount, but they may do so for a period long enough to effect considerable inconvenience to the public.

With regard to the circumstances of this particular transaction, and the objection to the contract as having been entered into on a *Sunday*, I do not say that the mere inception of a contract on a *Sunday* will avoid it, if completed the next day; but if most of the terms are settled on *Sunday*, and the mere signature be deferred to the next day, such a contract could scarcely be supported. It is not necessary, however, to decide that question upon the present occasion, for this contract was wholly completed on the *Sunday* if at all; and if not completed, the Plaintiff cannot recover. The solicitation of the bargain was on *Sunday*; and on *Sunday* the Defendant's agent delivered the contract on which the Plaintiff's claim must rest. As to the argument that the contract, if effected on a *Sunday*, was so effected without the Plaintiff's knowledge, and that therefore he is not liable to the consequences of his agent's misconduct, if we were sitting in another Court to decide whether or not, under the circumstances, the Plaintiff should be amenable to ecclesiastical censure, perhaps he might be holden not liable; but here we are deciding on the validity of the contract; and if the contract entered into by the broker be void, there is no contract on which the Plaintiff can sue, for he stands on a contract which his agent could not make. In every view of the statute of *Car. 2.* he was incompetent to make the contract in question. I was at first afraid that I could not subscribe to the judgment of my Brother *Bayley* in *Blossome v. Williams*; but for whatever might appear doubtful in that case, he has made ample amends in the

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case of *Fennell v. Ridler*. In one of the most able judgments ever delivered, he says that the most liberal construction must be put on that statute, because it is in affirmance of the religion which is the basis of the law of this country. It is not a question whether a part only of the contract be effected on a *Sunday*: the provision of the statute is, that no tradesman, artificer, workman, labourer, or any other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the *Lord's-day*, or any part thereof. Here the only contract which can be said to have been binding on the Defendant was delivered on a *Sunday*. In the cases referred to, the contract was not originally complete, but was perfected at a subsequent period. Here the whole was, in effect, complete on the *Sunday*; and unless it be permitted to a party to profit by a contract in defiance of the law of the country, the Plaintiff cannot recover.

PARK J. There is no ground for setting aside this nonsuit. It is not necessary, however, to argue the case upon the common law. The common law, indeed, is founded on our holy religion, and no law can be good which is not. But at common law, the observance of the Sabbath is a duty of imperfect obligation, as we find by *Rex v. Brotherton* (a), where it was held that selling meat on a *Sunday* was no offence at common law. But, upon the construction of the statute, there can be no doubt; and this is fully settled in the case of *Fennell v. Ridler*. I never read a more luminous judgment than that delivered by Mr. Justice Bayley in that case, and I do not think this Court was right in the decision of *Drury v. Defontaine*. (b) I think the construction put upon the statute, in that case, too

(a) 1 Str. 702.

(b) 1 Taunt. 135.

narrow. The expression, "*any worldly labour*," cannot be confined to a man's *ordinary* calling, but applies to any business he may carry on, whether in his ordinary calling or not. One part, however, of the judgment in that case, is a complete answer to an argument which has been urged to-day, for Lord Chief Justice *Mansfield* says, that, in such transactions, the act of the agent must be esteemed the act of the party. The statute being designed for the support of the religion of the country, ought to receive an extended construction, and the rule which has been obtained must therefore be discharged.

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BURROUGH J. The contract in this case was so complete on the *Sunday*, that nothing further was necessary to make it out. The broker was carrying on his business contrary to the express provision of the statute, for he was acting in his ordinary calling, and if the contract was void, the Plaintiff cannot avail himself of it.

GASELER J. It is not necessary upon the present occasion to put any construction upon the words of the statute, "*any worldly labour*," because the parties were in the exercise of their "*ordinary calling*." The only question, therefore, is, whether the contract was made on a *Sunday*. There seems no doubt that it was, and that, independently of the statute, an action would have lain against the Defendant for not fulfilling the engagement. The Plaintiff's subsequent assent, was an assent to the contract made on the *Sunday*, and there is no evidence to shew that there was any subsequent contract. There is, therefore, no analogy between the circumstances of this case and those of *Saunderson v. Judge*, where an inchoate contract was completed by a subsequent writing; but here, the whole contract was completed

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completed on the *Sunday*, so that it is unnecessary to enter into any nice distinctions, or to decide whether a contract would be binding if all the terms of it were agreed on *Sunday*, and a writing containing them signed the first thing on *Monday* morning. There being no valid contract, the Plaintiff has no ground of action, and the rule must be

Discharged.

Feb. 10.

COOKE, Demandant; YATES, Vouchee.

Meadow will pass in a recovery under the word "land," and the Court will not amend by adding the word "meadow."

ADAMS Serjt. moved to amend this recovery by inserting the word *meadow*, the recovery mentioning only *land*, and the property consisting, as appeared by affidavit, partly of arable and partly of meadow land.

He referred to *Fricker, Demandant; Bishop, Vouchee* (a), in which a similar amendment had been permitted, and cited *Silly v. Silly* (b), *Carthow*, 204., and 19 *Vin. Abr. Fine*, 236., to shew that land, in the language of pleading, signified arable land, and did not include meadow. Conveyancers had made the objection, and if the Court refused the amendment, the Vouchee would be obliged to sustain the expence of a law suit.

The Court took time to consider; and now,

BEST C. J. said, that for this time they would allow the amendment, but never in future. Lord Coke had said, "*terra est nomen generalissimum*, and comprehends all species of land as meadow pasture," &c. (c) Al-

(a) 1 Bingham 22.

(b) Vent. 260.

(c) Co. Lit. 4.

though

though the distinction was taken in *Silly v. Silly*, the decision in that case did not turn upon it; the distinction, indeed, was so absurd, that no man of sense could accede to it. If there were any thing in the objection, no meadow could ever have been taken under an elegit, for the statute of *Westminster* ordered the debt to be levied of the defendant's goods, or of a moiety of his lands.

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GASELEE J. referred to 1 *Burr.* 115., where Lord *Mansfield* says, that "common recoveries are a mere form of conveyance."

STRAHAN v. SMITH and Another.

Feb. 10.

ASSUMPSIT for use and occupation of a picture gallery. Upon an award made under an order of *Nisi Prius* in this cause, the arbitrator found that nothing was due from the Defendants to the Plaintiff, but stated the following facts to enable the Plaintiff to take the opinion of the Court:

In January 1808, *P. P. W. Porter* assigned, among other property of value, certain pictures to *P.* and *G. Tahourdin* as an indemnity against losses or expences which they might incur on account of *P. P. W. Porter*.

P. Tahourdin afterwards hired the Plaintiff's premises at a yearly rent, became tenant thereof to the Plaintiff, and deposited the pictures therein.

pictures from being distrained, they petitioned the Court to satisfy the Plaintiff's rent out of certain funds paid into court in the course of the cause. *T.'s* claim having been disallowed by the Court, the pictures were ordered to be delivered to the Defendants, who, in order to obtain them, paid rent to the time of delivery:

Held, that these circumstances did not constitute the Defendants tenants to the Plaintiff.

T. holding pictures of *P.*, as a security for an alleged debt, hired rooms of the Plaintiff in which to deposit them. *P.* having died, the Defendants, his administrators, contested *T.'s* claim by a suit in Chancery. Pending the suit, in order to prevent the

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In *May* 1809 *Porter* died, *P.* and *G. Tahourdin* being under liabilities for him, and having the pictures and other property, and claiming to be creditors to a large amount.

In *April* 1810, the father of the Defendants took out administration of the effects of *Porter*, as a creditor by bond; and in *June* 1812 filed a bill against *P.* and *G. Tahourdin*, for an account of all monies and pictures received to the use of the intestate, and to prevent them from disposing of any part of the property. An injunction was thereupon obtained, of which the Plaintiff had notice, and was restrained from selling the pictures.

A certain sum of money was paid into Court to the credit of the cause, under an order obtained by the Defendant's father on account of a bond due to *Porter*, which *P.* and *G. Tahourdin* claimed as a collateral security by assignment, and this was the only fund in Court.

The accounts between the intestate and the *Tahourdins* were referred to the Master, and the *Tahourdins* becoming bankrupt, their assignees were made parties to the suit.

The Defendant's father having died, they became administrators of *Porter*.

P. and *G. Tahourdin* being unable to substantiate their claim, the suit was dismissed; and, in *March* 1824, the Court ordered the pictures upon the Plaintiff's premises to be delivered to the Defendants, as the personal representatives of *Porter*. Pending the suit, the Plaintiff's rent was paid every year on the petition of the Defendants and their father out of the fund in Court, they alleging that the rent was due, and that they had been applied to for it.

On the 8th of *March* 1824, the Defendants received the pictures from the Plaintiff under the order of Court,
when

when they paid the Plaintiff's rent up to the 25th of that *March*, taking a receipt "for one year's rent for the care of pictures, the property of the late *P. P. W. Porter*," and giving a receipt for the pictures with the words, "Rent upon the same having been paid by us to the 25th instant."

The Plaintiff then alleged, that the Defendants were his tenants from year to year; that they were bound to give him a regular notice to quit, or, at all events, to pay rent to the end of the then current year.

The arbitrator thought that the relation of landlord and tenant never subsisted between the Plaintiff and Defendants, or their father.

Wilde Serjt. obtained a rule *nisi* to set aside this award, on the ground that the Defendants, by paying the rent, had admitted themselves to be tenants; and that, consequently, the award ought to have been in favour of the Plaintiff.

Bosanquet Serjt., who shewed cause, insisted that the relation of landlord and tenant never subsisted between the Plaintiff and Defendants; that it was competent to *Strahan* or *Tahourdin*, notwithstanding the chancery suit, to have ended the tenancy at any time, and to have placed the pictures in some safe custody by application to the court; that until the accounts were taken pursuant to the bill, it could not be known whether the Defendants had any interest in the pictures, so that they were not affected by the payment out of the funds in court, and when it was ascertained that they had an interest, the pictures could not be delivered up till payment of the warehouse rent; that payment therefore was made to obtain the pictures, and not in adoption of the tenancy. The *Tahourdins* might have occupied under a lease with covenants, and if the Defendants were held to have

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have adopted the tenancy, because they claimed the pictures, they might equally be held liable to all the covenants entered into by the *Tahourdins*.

Wilde, in support of his rule, admitted that an absolute tenancy subsisted in the first instance between *Tahourdins* and the Plaintiff, but argued that as soon as the injunction was obtained which restrained the *Tahourdins* from disposing of or parting with any of the property then in their possession or power belonging to the late *P. P. W. Porter*, the tenancy which at first was absolute, became contingent, and that the party who should ultimately succeed upon the chancery suit would become the tenant. Then *Porter's* administrator having applied by petition that the Plaintiff *Strahan's* rent should be paid out of the funds in court, he adopted the tenancy, and upon receiving the pictures became responsible for the rent.

BEST C. J. The question in this case is, whether the relation of landlord and tenant existed between the Plaintiff and Defendants. It appears that *P. W. Porter*, having made a collection of pictures, pledged them to the *Tahourdins* by way of security for a supposed debt. The *Tahourdins* provided a place for the reception of the pictures, and so were occupiers of the room in respect of which the rent is claimed; that appears distinctly on the award: and the question in this cause is, whether their interest in the premises has ever been transferred to the Defendants. In order to constitute the relation of landlord and tenant between them and the Plaintiff, there must have been a contract express or implied. Express contract there is none; but it has been urged that such a contract may be implied from the payment of rent by the Defendants. There certainly are cases in which such an implication would arise from the payment of rent, but every such implication is liable to

to be rebutted, and the circumstances under which this rent was paid do rebut any such implication. The mere payment of rent will not of itself constitute a tenancy; to have such an effect, it must be paid by the party in the capacity of tenant. But the Defendants never paid in any such capacity. After the death of *Porter*, a suit was commenced in equity to ascertain whether the *Tahourdins* were entitled to hold these pictures or not. During that suit, the Defendants, the *Smiths*, as *Porter's* representatives, paid the rent, not from their own funds, but out of monies which had been paid into chancery in the course of the suit. By the ultimate decision of the Court of Chancery, the *Smiths* were ordered to be put in possession of the pictures, and it is said that from this circumstance an agreement may be implied on their part to become tenants of the premises where the pictures were kept. But they had only paid out of court what was necessary to enable them to get possession of the pictures; their intention was solely to discharge the *Tahourdins'* lien, and not to become responsible for the rent. The relation of landlord and tenant never existed between them and the Plaintiff, and our judgment must, therefore, be for the Defendants.

PARK J. Looking at all the circumstances of this case, I think a tenancy by the Defendants cannot be implied. It was never alleged in chancery, that they were tenants to the Plaintiff; the suit was dismissed in 1824, and the pictures were ordered to be delivered up. The funds for the payment of the Plaintiff's rent were year by year obtained from the Court of Chancery. It would be most unjust to hold the Defendants liable as tenants, when it is plain they only paid the rent on behalf of the *Tahourdins*, and to save the pictures from a distress, till the suit in chancery between them and the *Tahourdins* should be determined. I think, therefore, that

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that the award is well made, and that our judgment must be for the Defendants.

BURROUGH J. concurred.

GASELEE J. According to the statement in this award, there never was a moment in which the Defendants were tenants to the Plaintiff. On the contrary, the Plaintiff treats the pictures as the pictures of the *Thourdins*. He was, indeed, entitled to distrain and sell them, and such being the case, the Defendants apply to the Court of Chancery, and procure the payment of the rent out of certain funds in court. But this, so far from raising any implication of a tenancy on their part, tends rather to exclude any such supposition.

Judgment for the Defendants.

Feb. 10.

HARRIS v. BOOKER.

By an inquisition taken on an *elegit* against *R. C.*, it was found, that at the time of the judgment he was seised of certain lands in the occupation of *B.* In point of fact, these lands were

DEBT for use and occupation. At the trial before *Best C. J.*, *London* Sittings after last *Michaelmas* term, it appeared that the Plaintiff had recovered a judgment against *R. E. Cresswell*, Esq., upon which, in *Easter* term 1826, an *elegit* was issued, directed to the sheriff of the county of *Gloucester*. The sheriff returned an inquisition, by which it was found that *Cresswell*, at the time of the judgment against him, was seised for life of certain lands at *Bibury*, in the occupation of the Defendant, (being the lands in respect of the rent of which vested in certain trustees in trust for *R. C.*, and for raising a sum of money for *A. F.*, but the trustees permitted *R. C.* to receive the rents :

Held, that the tenant, by *elegit*, could not sue *B.* for the rent.

the

the present action was brought;) and in *September* the Plaintiff served the Defendant with notice of the inquisition, and with a demand of the rent then due. More than 400*l.* was due, and the Defendant, upon being served, said that Mr. *Cresswell* was his landlord, and that he paid his rent to him.

On the part of the Defendant, it was proved that *Cresswell* had no legal interest in the lands in question: that they were vested in trustees under his father's marriage settlement and a subsequent settlement, for a term of 1000 years, in order, among other purposes, to raise 10,000*l.* for *Anna Maria Fry*, his aunt, and that the 10,000*l.* had not yet been raised under the settlement:

That *Cresswell* was in the meantime permitted by the trustees to receive the rents and profits.

Upon this evidence the Plaintiff was nonsuited, with leave to move to set aside the nonsuit and enter a verdict instead.

Taddy Serjt. having accordingly obtained a rule nisi to that effect,

Vaughan and *Wilde Serjts.* shewed cause.

The Plaintiff can have no better claim against the Defendant, the occupier of the land, than he has against *Cresswell* under the judgment; and, as against *Cresswell*, the *elegit* would give him no claim. By the statute 29 *Car. 2. c. 2. s. 10.* the sheriff can take under an *elegit* only such lands as the party against whom it issues is legally or beneficially entitled to; and *Doe d. Hull v. Greenhill* (a) has decided, that where the party is jointly interested in trust property with another, the land cannot be taken. The sheriff cannot deliver possession, (1 *Eq. Cas. Abr.* 381. *Taylor v. Cole* (b)), and his inquisition is

(a) 4 *B. & A.* 684.

(b) 3 *T. R.* 295.

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not conclusive, at all events, against the occupier, who might suffer great injustice if not permitted to impeach it,

Taddy. The tenant by *elegit* obtains a right to possession on the execution of the writ, and it is not necessary for him to sue out an ejectment or an *habere, facias, possessionem*. (Per Gibbs J. in *Rogers v. Pitcher*. (a)) By the execution of this writ, therefore, the Plaintiff was put in possession of whatever property *Cresswell* had, subject to the operation of the writ; but rent may be taken under an *elegit* as well as land (2 *Bac. Abr.* 712, *Execution*), and of the rent payable by the Defendant, *Cresswell* was in the actual receipt, according to the Defendant's own admission, so that by the execution of the *elegit*, the Plaintiff was entitled to it without attornment. This distinguishes the case from *Doe v. Greenhill*, where the trustees had entered, and had actually divested the *cestuique* trust of the receipt of the profits. The Defendant *Booker* having regularly paid his rent to *Cresswell*, could not contest *Cresswell's* title to receive it; and the Plaintiff standing in *Cresswell's* place, who has not traversed the inquisition, is now entitled to the rent under the *elegit*.

Cur. adv. vult.

BEST C. J. This was an action for use and occupation. In support of the Plaintiff's case a judgment, against the Defendant's landlord was given in evidence, and an *elegit*, under which possession had been taken of a moiety of his lands in the occupation of the Defendant. It appeared that more than 400*l.* was due for rent from the Defendant to his landlord, and it was insisted that the tenant by *elegit* might sue for this without any attornment, especially as the sheriff's inquisition had

(a) 6 *Taunt.* 207.

found that the landlord of the Defendant was seised of the land in respect of which the rent was payable. To this it was answered, that the land was vested in trustees for a term of 1000 years, to raise a sum of money for the landlord's aunt (which money had not yet been raised), and also for other purposes. The Plaintiff was thereupon nonsuited, and we are of opinion that the action cannot be maintained, and that the nonsuit was proper. We do not agree that an attornment would have been unnecessary, supposing the Plaintiff had been in a situation to call for it. Where a party claims under a contract, an attornment is rendered unnecessary by 4 Ann. c. 16. s. 9., which enacts, that all grants or conveyances thereafter to be made, shall be good and effectual to all intents and purposes without any attornment; but this applies only where property is acquired by grant or conveyance; in the present case it is claimed under a judgment, and even if the tenant by *elegit* had a right to enter, we think he could not have proceeded for rent without an attornment. But we decide this case principally on the authority of *Doe d. Hull v. Greenhill*, from which it is not to be distinguished. In that case, a verdict was found in ejectment for the lessor of the plaintiff, who claimed under a judgment recovered against the defendant, and a writ of *elegit* and inquisition thereon taken and returned; but liberty was reserved to the defendant to move to enter a nonsuit upon an objection taken at the trial. The objection was, that by a deed executed 23d of June 1809, long before the plaintiff's judgment was recovered, the legal estate in the premises was vested in trustees, for the purpose of securing an annuity to the defendant's mother, with permission to the defendant to take the rent till the annuity should be in arrear. By the deed the trustees were empowered to enter in case the annuity was in arrear, which they did

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in 1817. But at the time of the execution of the *elegit*, and of commencing the action, there was nothing in arrear. It was contended, for the plaintiff, that the case fell within the 29 *Car. 2. c. 3. s. 10.* as being premises held in trust for the defendant.

It was there holden that the plaintiff could not recover, because the estate was vested in trustees, though partly for the defendant's benefit. But if he could not recover in ejectment, neither could he in an action for the rent, because he could not claim the rent unless he had a right to enter. And it having been decided that a plaintiff cannot, under such circumstances, recover in ejectment, it is unnecessary for us to decide whether the plaintiff could enter at once under the *elegit*, or must also bring an ejectment to obtain possession. It is clear, in the present case, that the Plaintiff was not entitled to the possession of the land, as against the landlord *Cresswell*; and if so, he could have no claim against the tenant. The inquisition certainly found that *Cresswell* was seised of the land; but a stranger to the inquisition was not bound to traverse it: he might dispute its correctness in any other way. *Cresswell*, however, had nothing in the premises but a joint equitable interest, of which a court of equity could alone take cognizance.

Rule discharged.

GABELEEE J., not having been present at the argument, did not join in the judgment.

1827.

LINNEY, Vouchee.

Feb. 10.

VAUGHAN Serjt. moved that a recovery might pass, in which the language was, *calleth* to warranty, instead of *voucheth* to warranty.

In a recovery, "calleth to warranty" is an improper expression.

In the old *Latin* form the word was *vocat*; but

The Court observing that *voucheth* had a technical meaning, which could not be supplied by any other word, refused to let the recovery pass; and *Vaughan*

Took nothing.

ROLFE v. BURKE.

Feb. 12.

WILDE Serjt. objected to an affidavit, that it was entitled "in the Common Place," which was not the name of any Court; but

Practice. An affidavit entitled "in the Common Place," held sufficient.

The Court held the title sufficient, this Court having been fixed in *communi loco*, while the Court of King's Bench was ambulatory.

1827.

REGULA GENERALIS.

WHEREAS when the acknowledgments of persons levying fines or suffering recoveries are taken before commissioners, the affidavits which the present practice requires are not sufficient to satisfy the Court that the interests of married women are properly protected;

And whereas it is unfit that any attorney, solicitor, or agent, or the clerk of any attorney, solicitor, or agent of any party to any fine or recovery, should be a commissioner for the taking the acknowledgments therein; IT IS ORDERED by the Court, that from and after the first day of *Easter* term next, an affidavit shall be made by one of the commissioners before whom the acknowledgment of any of the parties to any fine or recovery is taken, deposing, in addition to the facts now required by the rules of the Court to be included in affidavits of the taking acknowledgments of fines or recoveries, that none of the commissioners are attorneys, solicitors, or agents, or clerks to any attorney, solicitor, or agent, of any of the parties to the fine or recovery for the taking the acknowledgment to which the commission under which they have acted has been issued.

IT IS FURTHER ORDERED, that the commissioners, from and after the first day of the next term, do enquire of married women whether they intend to give up their interests in the estates to be passed by any fine or recovery, without having any provision made for them by settlement or otherwise, in return for their having so given up their estates or interests; and if it appear to such commissioners that any settlement is to be made on any married woman, such commissioners shall see that
such

such settlement is properly made and duly executed, and one of them at least shall make an affidavit that this order has been fully complied with. AND IT IS LASTLY ORDERED, that this order shall be stuck up in all the public offices immediately.

1827.

W. D. BEST.

J. A. PARK.

J. BURROUGH.

S. GASELEE.

END OF HILARY TERM.

CASES

1827.

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Eighth Year of the Reign of GEORGE IV.

May 2.

GREENOUGH, Demandant ; Scott and Wife,
Deforciant.

Fine. Mis-
nomer of the
conusors ;
what, not
amendable.

IN the *dedimus* the conusors were named *Scott*, but they signed their names on the acknowledgment as *Scott*.

Being applied to for a fresh acknowledgment, they refused to give one. The consideration for the fine was 200*l.* lent by *Greenough* to *Scott* and wife.

Upon an affidavit of their identity by the conusees' agent, and that they had signed their names *Scott* by mistake,

Cross Serjt. moved that the fine might pass ; but the Court

Refused.

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AYTON v. BOLT.

May 5.

THIS was an action on an attorney's bill, to which the Defendant pleaded the statute of limitations. At the trial before Best C. J., *Middlesex* sittings after last term, it appeared that the debt had accrued in 1813, but that the Defendant having been applied to within six years, said he should be happy to pay the debt *if he could*, and added, that if the Plaintiff could recover for him a debt due to him from one *Gurney*, the Plaintiff might therewith satisfy his own debt.

Defendant being applied to to pay a debt barred by the statute of limitations, said he should be happy to pay it if he could: Held, that the Plaintiff must shew the Defendant's ability to pay.

No evidence having been given of the Defendant's ability to pay, which the Chief Justice required, a verdict was found for the defendant.

Peake Serjt. now moved for a new trial, on the ground that this was an unqualified promise, the Defendant only regretting that he had not present means of payment.

But the Court said, that the case fell within the rule laid down in *A Court v. Cross* (a); and *Peake*

Took nothing.

(a) 3 *Bingh.* 329.

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 May 7.

PHILLIPS v. ROBINSON.

Plaintiff delivered to Defendant the title-deeds of Plaintiff's wife's estate. Plaintiff having afterwards levied a fine of the property to the use of his son: Held, that Plaintiff could not support trover for the deeds.

DETINUE for deeds. The declaration alleged that the Plaintiff delivered, and caused to be delivered, to the Defendant certain deeds (describing them) of the said Plaintiff, of great value, to wit, of the value of 1000*l.*, to be re-delivered by the Defendant to the Plaintiff when the Defendant should be thereunto afterwards requested; yet the Defendant, although requested, refused to re-deliver them, and unjustly detained them.

Second count, that the Plaintiff was lawfully possessed, as of his own property, of certain other deeds (describing them), and being so possessed, lost them, and they came to the Defendant's possession by finding. Yet the Defendant, knowing them to be the property of the Plaintiff, had not delivered them to Plaintiff, though requested, but detained them.

Pleas: 1st, *non detinet*; 2dly, that the Plaintiff did not deliver the deeds to the Defendant; 3dly, that the Plaintiff was not lawfully possessed of the deeds, as of his own property; 4thly, that they were not the property of the Plaintiff; 5thly, that Defendant, as a conveyancer, had a lien on them.

At the trial before *Gaselee J.*, *Middlesex* sittings after last *Michaelmas* term, it appeared that the Defendant was entered, as a student at one of the Inns of Court, and had taken out a certificate as a conveyancer; that the deeds in question were the title deeds of an estate belonging to the Plaintiff's wife; that the Plaintiff or his agent, after his marriage, had delivered them to the Defendant, with instructions to prepare a conveyance of the property; that the Defendant prepared the convey-

ance

ance accordingly; that an attorney was employed by him to levy a fine of the property, to which the Plaintiff and his wife were parties; and that a fine was levied accordingly; the uses of which were declared to such person as Plaintiff's wife should appoint, and for default of appointment, to *George Philips*, second son of Plaintiff and his wife.

The Defendant detained the deeds, on the ground that his charges for preparing the conveyance had not been paid.

The learned judge directed the Plaintiff to be nonsuited, with leave to move to set the nonsuit aside and enter a verdict instead, thinking, under the above circumstances, that he had no property in the deeds at the time the action was commenced.

Wilde Serjt. in the last term obtained a rule *nisi* to set aside the nonsuit, on the ground that the Defendant having received the deeds from the Plaintiff, could not contest his right to demand them again; and that charges by him for work as a conveyancer could not be sustained in law.

Cross and *Spankie Serjts.* shewed cause. They argued at great length that the Defendant was entitled to charge for his work as a conveyancer, and if so, to detain the deeds till such charges were paid; but as the Court decided the case on another ground, their argument is omitted here. They then contended, that in detaining the jury were bound to find the value of the thing detained, with a view to assess damages in case the Defendant should refuse to deliver it up; that a deed could be of no value to a party who had no property in it; that deeds constituting the muniments and titles of estates are the property of the person to whom the estate belongs; that at the time of commencing the present

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present action, the property in the estate to which the deeds in question referred had been conveyed by the Plaintiff himself to his wife's second son; that at that time, therefore, the property in the deeds as in the estate was in that son, and not in the Plaintiff; and that, consequently, as the jury could find no value for the Plaintiff, he was properly nonsuited. *Viner, Detinue, C. pl. 2.* A bailer of goods who sells them after the bailment cannot recover them from the bailee.

They also argued, that supposing the Plaintiff to have had even a special property in the deeds, insomuch as they related to his wife's land, she ought to have been joined in the action: *Com. Dig. Bar. and Feme. 1 Roll. Abr. 347. Detinue Q. R.*: and cited *Poucher v. Norman (b)*, to shew that the Defendant was entitled to recover for work done as a certificated conveyancer. Upon these points, however, the Court gave no opinion.

Wilde in support of the rule. To entitle the Plaintiff to recover in this action, it was only necessary to shew that he or his agent delivered the deeds to the Defendant: the Defendant having received them at his hand, was precluded from disclaiming his title. It would be of most dangerous consequences, if persons employed were to be permitted thus to turn round on their employers; and *Dixon v. Hamond (a)* is an authority to shew they cannot do so. An agent who receives goods from his principal cannot afterwards refuse to redeliver them; and if the Plaintiff possessed these deeds merely for the purpose of delivering them, that gave him a sufficient special property in them to satisfy the allegation in the declaration that they were his deeds. The Defendant can no more dispute his title, than a tenant

(a) 2 B. & A. 310.

(b) 3 B. & C. 744.

that

that of his landlord under whom he entered upon the premises.

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BEST C. J. This was an action of *detinue* for certain deeds; to which the Defendant pleaded, first, that he did not detain them; secondly, that they were not lawfully in the possession of Plaintiff; thirdly, that they were not the Plaintiff's property. At the time the action commenced these deeds were not the property of the Plaintiff, because, whether they were originally so or not, the Plaintiff had at that time consented to a fine, by which the property in the lands to which the deeds referred had been conveyed to his second son. It is a clear principle of law, that the muniments of an estate belong to the person who has the legal interest in it; so that if the Plaintiff was originally entitled to receive the deeds on request, he was not so at the time of action, for he could only be so entitled as long as the right to the property continued in him.

The case cited from *Viner* is decisive on the point. That case rests on a decision in the year books, in which the party delivering a deed to the bailee had originally a right to it; but his right having passed away, the Court held he could not sue the bailee. No distinction has been pointed out between that case and the present; and it is perfectly consistent with good sense. Why should not the rightful owner in such a case sue at once? Why should the party who originally delivered the deed be supposed to retain a special property in it, in order to do that which the true owner might do directly? I do not agree to the position that a principal may in all cases recover property which he has delivered to his agent. Suppose a principal delivers the property of another who claims it at the hands of the agent: could the agent set up as a defence that he received the property from his principal? Certainly not. He would be answerable

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to the true owner, and not to the false claimant. With respect to the supposed analogy between this case and that of a landlord and tenant, it is true a tenant cannot dispute that his landlord had a title at the time of the lease, but he may shew that the title has expired subsequently to the lease. *England d. Syburn v. Slade.* (a) So here the Defendant may admit that the Plaintiff had once a title to these deeds, but insist that he parted with it before the commencement of this action. *Dixon v. Hamond* has no bearing on the present question. In that case, a ship, originally belonging to one of two partners, had been conveyed to one *Hart* for securing a debt; subsequently *Hart* conveyed her to the defendant upon his advancing to *Hart* the sum secured: the defendant, who was an insurance broker, afterwards effected an insurance in the names of the two partners, charged them with the premiums, and, the ship having been lost, received the amount of the insurance as their agent, but refused to pay such money to the assignees of the two partners, alleging that he was only accountable to the representative of the single partner to whom the ship first belonged. The Court would not endure so dishonest a proceeding; and *Abbott J.* said, "The defendant has received the money as agent for the partnership, and he cannot now be permitted to say that he received it for the benefit of *Flowerdew* alone." The present Defendant has not received money for two persons, and then attempted to say, "I received it only for one;" but he has received deeds under colour of a title which has now passed away from the party who delivered them. Suppose the case of the conusor of a fine: the estate and muniments belong to the conusee after the levying of the fine: could the conusor, after the fine had passed, maintain trover against the attorney for not redelivering the

(a) 4 T. R. 682.

title deeds of the estate? When the right to the estate went, the right to the muniments went also. The present case is of the same nature, and the rule for setting aside the nonsuit must be discharged.

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PARK J. In supporting this nonsuit I am not afraid of impeaching any principle of law. In order to support an action of *detinue*, the Plaintiff must have a general or a special property in what he seeks to recover. If he has not such a property, it may be shewn on the plea of *non detinet*. But at all events the fourth plea in this case has been clearly established. The Plaintiff had no property whatever in these deeds at the time of the action: it was all gone by the operation of the fine: if so, the case in *Viner* is in terms the same as the present. The Plaintiff here had conveyed the property to his son; and he, therefore, might have sued for the deed, although he had never been in possession of the property. *Roll. Abr. Detinue*. Therefore, without entering on the Defendant's right to detain, it is clear the Plaintiff had no right to sue.

BURROUGH J. In *detinue* the Plaintiff may recover either the specific thing detained, or the value of it. But what value could the jury find for the Plaintiff in the present case? I am clearly of opinion that this was an answer to the action upon *non detinet*. The province of the jury in this respect, cannot be supplied by a writ of enquiry. But in order to establish that the deeds are of any value to him, the Plaintiff must shew that he has a right to them. In *Co. Lit.* 283. it is laid down; "If the defendant plead *non detinet*, he may give in evidence a gift by the plaintiff, for that shews he does not detain his goods." At the time of this action the Plaintiff had no interest in these deeds; they were of no value to him; and, therefore, the nonsuit was right.

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GASELEE J. I had some doubts at first whether want of property in the Plaintiff might be given in evidence on *non detinet*, but the passage from Lord Coke renders that point clear. If the Defendant relies on a lien, that must be specially pleaded; but he may give in evidence, under *non detinet*, that the Plaintiff has no property in the thing sought to be recovered. The circumstance that the Plaintiff delivered the deeds to the Defendant will not avail him, since he himself has subsequently executed a conveyance which carries the deeds with it.

Rule discharged.

May 7.

EYLES v. ELLIS.

The Plaintiff, in October, authorized Defendant to pay in at certain bankers money due from the Defendant.

Owing to a mistake it was not then paid; but Defendant, who kept an account with the same bankers, transferred the sum to the Plaintiff's credit on Fri-

day the 9th of December.

The Plaintiff being at a distance, did not receive notice of this transfer till the Sunday following, and on the Saturday the bankers failed:

Held, that this was a sufficient payment by the Defendant.

COVENANT for rent due from the Defendant to the Plaintiff.

At the trial before *Onslow* Serjt., last *Kent* assizes, the Defendant put in the Plaintiff's receipt for the amount claimed.

The Plaintiff then shewed that he had given the receipt, upon hearing from the Defendant that he had paid the amount to the Plaintiff's banker at *Maidstone*, to whom the Defendant had, in October 1825, been requested by the Plaintiff to pay it. The Defendant, who kept an account with the same banker, ordered the amount to be transferred from his account to the Plaintiff's credit: it was discovered, however, that owing to some mistake this had not been done at the time when the Plaintiff's receipt came to the Defendant's hands;

but

but upon the Plaintiff's complaining, the Defendant on the 8th of *December*, ordered the mistake to be rectified, and on *Friday*, the 9th of *December*, addressed a letter, to the Plaintiff, announcing that the mistake had been rectified: this letter the Plaintiff, being at a distance, did not get till the ensuing *Sunday*. In the interval the bankers failed, and never opened their bank after the *Saturday*. The transfer in the banker's books, from the Defendant's account to the Plaintiff's, appeared to have been made on the 8th, at which time the Defendant's account was overdrawn about 900*l*. The learned serjeant thought that this transfer amounted, under the circumstances, to payment, and a verdict having been found for the Defendant,

Taddy Serjt. moved for a new trial, on the ground that no actual payment had been made to the Plaintiff; that he could not be satisfied by a mere transfer in the banker's book, and that not having received the letter till the *Sunday*, when the bankers had suspended payment, he had no opportunity of drawing the amount out of their hands: the verdict might have been acquiesced in if he had received notice of the transfer on the *Friday*. The Defendant had no general directions to pay to the Plaintiff's bankers, and an authority to deposit money with them in *October* did not warrant making a transfer in *December*.

Best C. J. The learned serjeant was right in estimating this a payment. The Plaintiff had made the *Maidstone* bankers his agents, and had authorized them to receive the money due from the Defendant. Was it then paid, or was that done which was equivalent to payment? At first, not; but on the 8th a sum was actually placed to the Plaintiff's account; and though no money was transferred in specie, that was an acknow-

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ledgment from the bankers that they had received the amount from *Ellis*. The Plaintiff might then have drawn for it, and the bankers could not have refused his draft.

The rest of the Court concurring, *Taddy*

Took nothing.

May 8.

M'TAGGART v. ELLICE.

Affidavit to hold to bail; what, insufficient.

THE affidavit to hold to bail, stated the Defendant to be indebted to the Plaintiff upon a promissory note for 10,000*l.*, drawn in favour of *Inglis, Ellice*, and Company, and *duly* indorsed to the Plaintiff.

Taddy Serjt. obtained a rule *nisi* to set aside the bail-bond and enter a common appearance, on the ground that the affidavit did not state an indorsement or debt from *Ellice* to the Plaintiff.

Wilde Serjt., who shewed cause, urged that an indorsement by *Ellice* was implied in the word *duly*.

But the Court held the affidavit insufficient, and made the rule

Absolute.

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GRAHAM and Another, Assignees of THOMAS WILKINSON and JAMES MULCASTER, Bankrupts, v. MULCASTER. May 8.

ASSUMPSIT. In the first, second, third, and fourth counts, the Plaintiffs declared as assignees of *Wilkinson* and *Mulcaster*, upon promises by Defendant to *Wilkinson* and *Mulcaster* before their bankruptcy, in respect of debts due to them before their bankruptcy: Breach, non-payment to *Wilkinson* and *Mulcaster* before they became bankrupt, or to Plaintiffs as assignees as aforesaid, since.

Assignees under a joint commission against two partners, may recover in the same action debts due to the partners jointly and debts due to them separately.

Fifth count, that Defendant after *Mulcaster* became a bankrupt, and before *Wilkinson* became a bankrupt, being indebted to Plaintiffs as assignees of *Mulcaster* as aforesaid, promised the Plaintiffs as assignees of the said *Mulcaster* as aforesaid.

Sixth and seventh, that Defendant being indebted to Plaintiffs as assignees as aforesaid, promised them as assignees as aforesaid to pay. Breach, as to the three last promises, non-payment to Plaintiffs as assignees as aforesaid.

Demurrer, for that Plaintiffs by the four first counts of their declaration, had declared against the Defendant in respect of divers causes of action therein mentioned to have accrued to *Wilkinson* and *Mulcaster* before they became bankrupts, and have, in the fifth count, declared in respect of a cause of action alleged to have accrued to them as assignees of *Mulcaster* only; and in the sixth and seventh counts have declared in respect of causes of action alleged to have accrued to them as such assignees as aforesaid, without shewing whether such causes of

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action accrued to them as assignees of *Mulcaster* or of *Mulcaster and Wilkinson*, thereby including in the declaration causes of action which cannot by law be joined, Joinder.

Onslow Serjt., in support of the demurrer, cited *Hancock v. Haywood* (a), where it was held that the assignees of *A.* a bankrupt, and also of *B.* a bankrupt, under separate commissions, could not recover in the same action a joint debt due from a defendant to both bankrupts, and also separate debts due to each; and *Ray v. Davies* (b), where *A.* and *B.* being assignees under one commission, and *C.* under two others, issued against three partners, it was held they could not sue jointly; whence he argued, that the Plaintiffs in the present case had sued on distinct causes of action that could not be joined. He also urged, that the expression *as assignees as aforesaid*, without distinguishing of whom, whether of *Mulcaster* or *Mulcaster and Wilkinson*, it appearing by the previous counts that there had been two commissions, was an ambiguity fatal to the last four counts.

Wilde Serjt. *contra*. In *Hancock v. Haywood* and *Ray v. Davies* the assignees were strangers to each other as to separate debts under the different commissions against several partners, there being no joint commissions against the whole firm. But in *Scott v. Franklin* (c) Lord *Ellenborough* said, "If joint assignees could not recover the separate debts of one or more, there would be an end of all power of enforcing such demands." There being, therefore, a joint commission in the present case, the different causes of action may be well joined. The rule of pleading is, that where the same plea may be pleaded, and the same judgment be given,

(a) 3 T. R. 433.

(b) 8 Taunt. 134.

(c) 15 East, 436.

and

and still more when the money to be recovered will go to the same fund, the different causes of action may be joined. All those tests concur in the present case; the same plea might have been pleaded; the judgment will be the same on all the counts; and the sum recovered will go to the same fund, to be distributed among the creditors of *Wilkinson* and *Mulcaster*. As to the alleged ambiguity, although it appears from the fifth count that *Wilkinson* became a bankrupt subsequently to *Mulcaster*, yet as nothing is said in that or the following counts of a separate commission against *Wilkinson* or *Mulcaster*, or of the Plaintiffs being assignees under a separate commission, the expression *as assignees as aforesaid*, can only refer to the joint commission and joint assigneeship mentioned in the preceding counts.

BEST C. J. This is an action by the assignees of two partners, bankrupts, and the declaration contains counts on debts which accrued to the partners jointly before their bankruptcy, and counts on debts which accrued to one of them separately. To this declaration there is a demurrer, on which two objections are raised; one, that these separate causes of action ought not to have been joined in the same declaration; the other, that there is an ambiguity in the latter counts, as not disclosing whether the Defendant is indebted to the Plaintiffs, as assignees of the two partners, or only of one. I think there is no validity in either of the objections. Under a commission of bankrupt against partners, the joint and separate property of the partners is transferred to the same assignees, who are empowered, also, to recover and distribute the separate as well as the joint debts of the partners; but with the distribution we have nothing to do in a court of law; therefore, if a debt be due to *A.*, and another to *B.*, the assignees of *A.* and *B.* may recover both in one action. If it were otherwise, great and unnecessary expence and inconvenience would be entailed upon the

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commission ; and there is no authority opposed to such a practice : for though the debts in the present case are several, the assignees claim them by virtue of the same commission. *Hancock v. Haywood* is in support of the position we now lay down. In that case it was held, that the assignees of two partners under separate commissions might join in an action to recover joint debts due to the two partners ; *a fortiori*, then, assignees under a joint commission against two partners ought to be entitled, under that commission, to recover in a joint action debts due to the partners separately.

With regard to the alleged ambiguity arising out of the designation *assignees as aforesaid*, it sufficiently appears, upon the whole of the declaration, to refer to the assignees, as suing under the joint commission.

PARK J. Looking attentively at the fifth count, I think it sufficiently appears that the expression *assignees as aforesaid*, refers to the Plaintiffs as assignees under their joint commission against the two partners ; for the Plaintiffs are no where stated to be assignees under any separate commission. Under the joint commission it is clear they may recover debts which accrued to the partners separately. The language of Lord *Ellenborough* in *Scott v. Franklin* is decisive.

BURROUGH J. Being assignees of the two partners they are assignees also of each, and may recover the debts due to each, so that every count in the declaration may be supported. There is no ground for the objection.

GASELER J. Upon the objection as to misjoinder, judgment must be for the Plaintiffs ; and though there may be some degree of uncertainty in the fifth count, it is not such as renders the count bad.

Judgment for Plaintiffs.

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BROWN v. The Honourable GRANVILL ANSON
CHETWYND STAPYLETON and Others.

May 8.

THIS was an action of *assumpsit* brought by the Plaintiff, as owner of a ship called the *Princess Royal*, against the Defendants, three of the commissioners for victualling his Majesty's navy, to recover a contribution towards a general average, due in respect of part of the furniture of the said ship having been lost and damaged for the preservation of the ship and cargo, whilst on a voyage with convicts and also with provisions and stores put on board for the use of those convicts on the voyage, by the Defendants.

Provisions do not contribute to general average, even where the cargo of the ship consists only of passengers.

The Defendants pleaded the general issue, upon which issue was joined; and at the trial of the cause before Best C.J. and a common jury at *Guildhall*, at the sittings after *Hilary* term 1826, a verdict was found for the Plaintiff, damages 150*l.*, subject to the opinion of the Court on the following case:

On the 17th *June* 1822 the said ship, the *Princess Royal*, belonging to the plaintiff, was taken up on charter by the commissioners of his Majesty's navy, for the conveyance of convicts, with their necessary attendants to *New South Wales*.

The Defendants were then, and are now, three of the commissioners for victualling his Majesty's navy, and as such commissioners they caused to be shipped on board the said vessel, for the subsistence, use, and consumption, during the voyage of such convicts and their necessary attendants, provisions and victualling stores of the value of 1353*l.*, or thereabouts.

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On the 13th *September* 1822, the said ship received on board, for a passage to *New South Wales*, the following number of persons, for whose passage the said ship was taken up, *viz.* 156 convicts, four women, eight children, one surgeon, and thirty-five soldiers. On the 14th *October* 1822, while the ship was in the *Downs* in the prosecution of her voyage, a general average loss was sustained, amounting in the whole to the sum of 280*l.* 5*s.*

The ship was then at the value of 4500*l.*, the freight at the value of 1866*l.* 14*s.* 10*d.*; and so much of the provisions and victualling stores shipped by the Defendants as remained then unconsumed were of the value of 1162*l.* 9*s.* 9*d.*

If the Defendants were, in respect of such provisions and victualling stores, liable by law to contribute to a general average loss, their proportion on the provisions and victualling stores, then unconsumed, amounted to 41*l.* 13*s.* 9*d.*, which was the sum sought to be recovered in this action.

The question for the opinion of the Court was, Whether the Plaintiff was entitled to recover? If the Court were of opinion that the Plaintiff was so entitled, the verdict was to stand; but if of a contrary opinion, a nonsuit was to be entered.

Taddy Serjt. for the Plaintiff.

Generally speaking, contribution to a general average cannot be demanded in respect of the apparel or food of the passengers. (a) But contribution must always be made in respect of the cargo or merces. (b) All who have valuable property on board; all who are interested in the cargo, must contribute to that which has been sacrificed to all. But in a ship hired to carry convicts, the convicts are themselves the cargo, and not like pas-

(a) *Magbens*, 62, 63.

(b) *Park on Ins.* 217. *Roccus*, 62.

sengers in ordinary cases, a mere accidental addition to the cargo. The victualling board were interested in the stores necessary for the support of the convicts, just as other merchants are interested in a general cargo. The provisions and convicts were in effect the *merces* of this voyage, and, therefore, distinguishable from the case where the provisions are for a few passengers, and of small comparative value. The commissioners have received a benefit to the extent of the value of the stores, and to that extent they ought to contribute. Whatever is capable of insurance is capable of being brought into general average; and these stores were clearly capable of insurance. Upon the principles of contribution referred to by Gibbs C. J. in *Taylor v. Curtis* (a), *omnium contributione sarciatur quod pro omnibus datum est*, it would be incompatible with justice that the commissioners should not contribute.

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BEST C. J. It is not necessary for us to consider the policy of the law which has been established on this subject; it seems, however, to be perfectly consistent with justice. The law is of foreign origin; but the principle of it has been long known and acted on in this country. It is not every object of value which has been held liable to a contribution for average, but only such stores as are termed *merces*. *Merces* has never been held to extend to provisions, but includes only the cargo put on board for the purposes of commerce; and the practice shews that this has been the understanding of all times. *Maghens, Molloy, Bearwes, Stevens*, and other writers, all expound the word *merces* in this way; all in terms exclude provisions. They concur in saying, that things of light weight, but of considerable value, must contribute, if they belong to the cargo, but not if they belong

(a) 2 Marsh. 309.

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to the passengers. Provisions are laid in for the passengers, and must be esteemed to belong to them. Further than this, the ship is always brought into average according to her reduced value at the end of the voyage, when the provisions have mostly been consumed. As to the argument, that the convicts must be esteemed the *merces* upon this voyage, and so the stores laid in for them be chargeable as parcel of the *merces*, it is clear, that whether cargo or not, they cannot be brought into contribution, because human life is not the subject of average. If, therefore, the convicts themselves cannot be brought into contribution, much less can the provisions, which are merely accidental to their passage.

PARK J. I have been astonished how a case could have been granted in this instance. No question has ever before been raised upon the point. Provisions have always been held an exception from the general rule respecting contribution. The rule is, that all merchandise put on board for the purpose of traffic is liable to be brought into contribution, and in merchandise is included all property of great value, unless attached to the persons of the passengers; but property so attached does not contribute; and all the writers on the subject go on to say, that the owners are not liable to contribute for the victuals and ammunition of the ship. Convicts are not to be considered as cargo, because, though average has been allowed for slaves thrown overboard, the authorities are clear, that there can be no estimation of the life of a freeman. (a)

The rest of the Court concurred.

Judgment of nonsuit.

(a) *Abbott on Shipping. Molloy.*

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HALL v. CHANDLESS.

May 8.

THE following case was sent by the Vice-Chancellor for the opinion of the Court of Common Pleas.

Edward Berkley Portman, Esq., being seised, or well and sufficiently entitled thereto, agreed to let to *James Thompson Parkinson*, architect, or his nominees, for building thereon, for a term of ninety-nine years, commencing from *Christmas-day* 1822, a piece of ground in the parish of *St. Mary-le-bone*, in the county of *Middlesex*, at a rent to be reserved and to be apportioned, and made payable out of the best houses to be thereon erected; and after such rent had been so secured, it was agreed that a lease should be granted of the residue of the said piece of ground to the said *James Thompson Parkinson* or his nominee, at a pepper-corn rent for the said term of ninety-nine years:

The said *J. T. Parkinson* then agreed with *William Hall* the younger, and *Charles Hall*, to let the said piece of ground to them upon the like terms: in the first instance, towards securing in part the rent to be reserved to the said *E. B. Portman*; and next with an additional rent to be reserved, apportioned, and made payable to him, the said *J. T. Parkinson*, out of the next best set of houses which were to be erected upon the said piece of ground; and after such rents had been so secured, it was agreed that a lease should be granted of the remainder of the said piece of ground to the said *W. Hall* the younger, and *Charles Hall*, or their nominees, at a pepper-corn rent for the said term of ninety-nine years:

Lease of lands by *A.* to *B.*, at the request of *C.*, *D.*, and *E.*, out of which, *B.* was to grant underleases at the direction of *C.*, *D.*, and *E.* (the object of which underleases was to secure a ground-rent to *A.* and *C.*), and subject to such underleases, was to stand possessed of the lease in trust for *D.* and *E.*, who were parties to the original lease:

After *C.*, *D.*, and *E.* had executed that lease, and before *A.* or *B.* had executed it, the lease was altered with the consent and privity of *C.* only, by an erasure, which excluded a certain portion of land inserted

by mistake, but in which *D.* and *E.* had no interest. *A.* and *B.* then executed the lease: Held, that this alteration did not render it invalid.

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The said *W. Hall* the younger, and *C. Hall*, afterwards agreed with various persons as under-tenants, to grant or procure to be granted to such under-tenants, leases of three pieces of ground, (in respect of which the present question arose,) being a part of the first mentioned piece of ground for the purpose of building thereon, in consideration of certain ground rents, amounting altogether to 221*l.* 13*s.* 4*d.*: which under-tenants erected several houses upon the same accordingly :

The said *W. Hall* the younger, and *C. Hall*, thereupon required the said *E. B. Portman* and *J. T. Parkinson*, either to take the said rent of 221*l.* 13*s.* 4*d.* in satisfaction of the rents agreed to be reserved to them as aforesaid ; and for that purpose to grant the leases the said *W. Hall* the younger and *C. Hall* had agreed as aforesaid to procure to be granted to the said under-tenants, or to grant to the said *W. Hall* the younger and *C. Hall* a pepper-corn lease for the said term of ninety-nine years, of the said three pieces of ground, to enable the said *W. Hall* the younger and *C. Hall*, themselves, to grant such under-leases :

The said *E. B. Portman* and *J. T. Parkinson* refused to accede to such request, stating that better houses would be erected on other parts of the first mentioned piece of ground, out of which better houses the said *E. B. Portman* and *J. T. Parkinson* would take their rents ; and that till such rents were so secured, they would grant no pepper-corn lease to the said *W. Hall* the younger and *C. Hall* :

At last it was agreed between the said *E. B. Portman* and *J. T. Parkinson*, and *W. Hall* the younger, and *C. Hall*, that a pepper-corn lease should be granted to *Mr. T. Wilson* (*Mr. Portman's* solicitor, and who prepared the after-mentioned lease) by the said *E. B. Portman*, at the request and by the direction of the said *J. T. Par-*

J. T. Parkinson and *W. Hall* the younger, and *C. Hall*, and that the said *T. Wilson* should afterwards grant leases to the said under-tenants, at the rent of 221*l.* 13*s.* 4*d.*, and subject to such under-leases, should stand possessed of the said lease granted to him, and the hereditaments thereby demised, *in trust* for the said *W. Hall* the younger and *C. Hall*, when they should have secured the rent agreed as aforesaid, to be reserved to the said *E. B. Portman* and *J. T. Parkinson*. And accordingly, by indenture of lease dated the 17th March 1826, and consisting of a lease and counterpart expressed to be made between the said *E. B. Portman*, of the first part; the said *J. T. Parkinson*, of the second part; the said *W. Hall* the younger and *C. Hall*, of the third part; and the said *T. Wilson*, of the fourth part; reciting, amongst other things, the matters above-mentioned;

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It was witnessed, that, in consideration of the rents, covenants, and agreements thereafter reserved and contained, on the part and behalf of the said *T. Wilson*, his executors, administrators, and assigns, to be paid, observed, kept, done, and performed, he the said *E. B. Portman*, at the request, direction, and appointment of the said *J. T. Parkinson*, *W. Hall* the younger and *C. Hall*, testified by their being parties to and executing the stating indenture did demise and lease unto the said *Thomas Wilson*, his executors, administrators, and assigns, three several pieces or parcels of land, described in the lease to hold for ninety-nine years, at a pepper-corn rent, under a number of the usual covenants and provisions contained in building-leases:

And it was thereby agreed and declared, between and by the said parties to the stating indentures, that the said *Thomas Wilson*, his executors, administrators, and assigns, should (subject to such under-leases as should be granted by him or them by the direction of the said *W. Hall* the younger, and *C. Hall*, their executors, administrators, and assigns) stand possessed of the said three

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three pieces of ground thereby demised for the term thereby granted, and of the now stating lease, *in trust* for the said *E. B. Portman*, his heirs and assigns, until the said rent agreed to be reserved to him should be secured; and afterwards *in trust* for the said *J. T. Parkinson*, his executors, administrators, and assigns, until the said rent agreed to be reserved to him should be secured; and afterwards *in trust* for the said *W. Hall* the younger, and *C. Hall*, their executors, administrators, and assigns, and to be assigned and delivered to them accordingly: and it was thereby declared, that the said *E. B. Portman*, his heirs or assigns, and the said *J. T. Parkinson*, his executors, administrators, or assigns, as soon as the said rents agreed respectively to be reserved to them should be secured, should acknowledge the same under their hands at the back of that lease:

That the said *J. T. Parkinson* and *W. Hall* the younger, and *C. Hall*, executed the said lease and counterpart in their then state, but afterwards, and before the execution thereof by either of them the said *E. B. Portman* and *T. Wilson*, an alteration was made in the parcels of the lease, by striking out of the description of the third piece of ground in the lease, and in the counterpart, the words, "and East in part on *Weston Place*," and also the words, "in the other part;" and striking out the corresponding part of the plan:

By such alteration a piece of ground 40 feet in front, next *Richmond Street*, and 117 feet 3 inches in depth, was withdrawn from the demise.

The lease and counterpart, thus altered, were afterwards executed by the said *E. B. Portman* and *T. Wilson*.

There were two attestations to the lease and counterpart, one of which noticed the execution of the lease and counterpart by the said *J. T. Parkinson* and *W. Hall* the younger, and *C. Hall*, and the other the execution
of

of the said lease and counterpart by the said *E. B. Portman* and *T. Wilson*; but neither of such attestations took notice of any alteration having been made in the said lease and counterpart.

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The instructions to prepare the said lease and counterpart were given to *Samuel Palmer*, clerk to the said *T. Wilson*, by the solicitor for the said under-tenants of the said *W. Hall* the younger and *C. Hall*; and for the guidance of the said *Samuel Palmer*, a plan of the said three pieces of ground, including the said withdrawn piece of ground, was delivered by the said solicitor to the said *S. Palmer*; and the said *S. Palmer* accordingly prepared the said lease and counterpart as aforesaid, agreeably to such instructions and plan, considering the same to be pursuant to the intention of all the parties; and the said *S. Palmer* procured the said lease and counterpart to be executed, as hereinbefore mentioned, by the said *J. T. Parkinson*, *W. Hall* the younger, and *C. Hall*.

After the said lease and counterpart were so executed, the said *S. Palmer* discovered that the said withdrawn piece of ground ought not to have been thus included; and, upon making such discovery, he acquainted the said *J. T. Parkinson* thereof, who thereupon told the said *S. Palmer* that the plan so as aforesaid given to the said *S. Palmer*, as part of the instructions to prepare the said lease and counterpart, was incorrect, and that the said withdrawn piece of ground ought not to have been included therein, and that he (*S. Palmer*) would do right in taking the same out of the said lease and counterpart.

In consequence of that conversation the said *S. Palmer* made the hereinbefore-mentioned alterations in the said lease and counterpart.

The said alterations were made with the approbation or privity of the said *J. T. Parkinson* only, but not with the

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the approbation, or privity, or at the request of any of the other parties to the said lease and counterpart.

The said *E. B. Portman* and *T. Wilson* afterwards, as hereinbefore-mentioned, executed the said lease and counterpart.

The rents agreed to be reserved to the said *E. B. Portman* and *J. T. Parkinson* have since been duly reserved, and they have acknowledged the same in manner aforesaid accordingly.

The said *W. Hall* the younger and *C. Hall* had contracted to sell to *Thomas Chandless* the said ground-roots of 221^l. 13^s. 4^d. for the sum of 3103^l. 6^s. 8^d. and to assign to him a good and proper pepper-corn lease of the said three pieces of ground.

It was admitted on all sides that the said *William Hall* the younger and *C. Hall* were not in any manner interested in the insertion or omission of the place of ground above referred to, as withdrawn by the aforesaid erasure and alteration, and that no part of the said roots of 221^l. 13^s. 4^d. issued out of the said withdrawn piece of ground, and that if the same were now in the said indenture, the said *W. Hall* the younger and *C. Hall* would not be entitled to any beneficial interest in the said withdrawn piece of ground, and that if the same piece of ground were assigned to the said *T. Chandless*, he would claim no beneficial interest therein.

The said *Thomas Chandless* objected to the validity of the said lease to the said *T. Wilson* on account of the aforesaid alterations, considering that a good and marketable title could not be made out to the said *T. Chandless* under the above circumstances.

The question for the opinion of the Court was, whether the above-mentioned indenture, dated the 17th day of March 1826, was a valid deed, notwithstanding the alteration that was made therein after the execution thereof by the said *W. Hall* the younger and *C. Hall*, and

and *J. T. Parkinson*; but before the execution thereof by the said *E. B. Portman* and *T. Wilson*?

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Adams Serjt. The alteration was immaterial, and the deed is valid. The only parties who grant and take beneficially by the deed being *Portman* and *Wilson*, the others cannot dispute the instrument, if legally executed by those two. But according to the principle laid down in *Pigott's case* (a), a deed is only avoided by alteration, where the alteration takes place without the privity of a party beneficially interested, and after execution by him. In no case has it been decided that an alteration before execution by the grantor and grantees can affect the validity of the instrument. In *Doe d. Lewis v. Bingham* (b), blanks were left in a mortgage deed in a part not affecting the mortgagee; these blanks were filled up, and interlineations made in the same part of the deed, after execution by the mortgagee. The alteration there being in an immaterial part of the deed, it was held that the deed was not avoided. The same principle appears in *Com. Dig. tit. Fait. F. 1.*

Was the deed affected by the stamp acts, for unless the alteration were so material as to make it in effect a new deed as between the grantor and grantee, a new stamp cannot be required. Besides, in *Boon v. Mitchell* (c) it was decided, that the *ad valorem* stamp required on leases, applies only to the consideration between the lessor and lessee.

Bousquet Serjt. The deed is void. The instrument executed by *Portman* and *Wilson* being altogether a different instrument from that executed by the other parties. When the first and second parties executed the deed, it professed to convey one set of premises, but when it

(a) 11 Rep. 27.

(b) 4 B. & A. 673.

(c) 1 B. & C. 18.

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was executed by *Portman* and *Wilson*, it conveyed premises of a very different description. There are two sets of attesting witnesses, and the parchment attested by one set describes premises not contained in the parchment attested by the other. Though *Parkinson* and *Hall* take no legal interest by the deed, yet if some of the parcels be withdrawn, the extent of the covenant under which they were to take the parcels entire, is narrowed, and the whole effect of the deed is altered as to them.

The case is, therefore, distinguishable from *Doe d. Lewis v. Bingham*, for here one of the parties takes on a certain trust, which trust has been varied by the effect of the alteration. According to the rule laid down in *Markham v. Gonaston* (a), if parties enter into an agreement, and then execute it after alteration, the agreement executed is not the same as that entered into. The deed, when executed by *Portman* and *Wilson*, did not contain the same agreement as that entered into when *Hall* and *Parkinson* executed it. Therefore, at all events, a new stamp would be necessary. The decision of the Court must turn on the contents of the deed itself, and not on matters *dehors* the deed.

Adams was heard in reply; and

The following certificate was afterwards sent:—

We have heard this case argued by counsel, and considered it; and we are of opinion, that the above mentioned indenture, dated the 17th day of *March* 1826, is a valid deed, notwithstanding the alteration that was made therein after the execution thereof by the said *William Hall* the younger, and *Charles Hall*, and *James Thompson Parkinson*, but before the execution thereof by the said *Edward Berkley Portman* and *Thomas Wil-*

(a) *Gr. Blin.* 626.

such alteration not having been made after the execution by the lessor or lessee.

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W. D. BEST.

J. A. PARK.

J. BURROUGH.

S. GASELEE.

(IN THE EXCHEQUER CHAMBER.)

SARQUY v. HOBSON.

May 9.

ERROR. The Plaintiff below declared in assumpsit on a policy of insurance on goods on board the ship *Pekin*, and averred that the said ship on the high seas, by and through the perils and dangers of the seas, and the force of the waves, was greatly damaged and rendered leaky, insomuch that by means thereof the said goods became and were wholly lost to the Plaintiff, and never did arrive at the ship's port of discharge.

An insurer on goods is not liable when the goods are sold by the captain of a ship to defray the expence of repairs, rendered necessary by a tempest, to which ship and goods had been exposed.

The Defendant below pleaded the general issue, and it was found by a special verdict, that the Plaintiff caused the policy of assurance in the declaration mentioned to be made, and that *David Abarbanel Lindo*, residing in *Great Britain*, received the order for, and effected the said policy of assurance. That the Plaintiff, at the request of the Defendant, duly paid to the Defendant the sum of 78*l.* 15*s.* as a premium for the assurance of 500*l.* upon the said goods in the within mentioned ship or vessel, on the voyage within mentioned. That the said goods were at *St. Jago*, in the isle of *Cuba*, in and on board the said ship or vessel, to be carried therein, on the voyage in the within mentioned writing or policy of

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assurance mentioned; and that the Plaintiff was then and until the sale thereof, as hereinafter mentioned, interested in the goods to the amount of all the monies by him ever insured, or caused to be insured thereon; and that the said insurance was made on the said goods to and for his own use and benefit. That on the 30th *May* 1817, the said vessel having the said goods on board thereof, sailed from *St. Jago*, in the isle of *Cuba*, on her voyage within mentioned; and that in the course of the said voyage the said vessel was overtaken by a tempest and sprung a leak, and made so much water, that it became necessary, for the preservation of the ship and cargo, to make for the nearest port, which turned out to be the *Havannah*, to which port the master of the said vessel, after consultation with the crew thereof, proceeded with the said vessel. That on the arrival of the said vessel at the *Havannah* aforesaid, it became necessary for the purpose of ascertaining the cause of her leaking, to discharge the cargo, which was accordingly done, and surveys of the said ship having been held, it was found expedient to remove the copper-sheathing, in order to get at the leak, which was done, and the ship was repaired, new caulked, and refitted for sea; and that without these repairs the ship would not have proceeded on her said voyage. That the master of the said vessel not having any other means of defraying the expence occasioned by the said repairs of the said vessel there, sold part of the cargo, consisting of 716 bags, and 18 barrels of coffee, belonging to the said plaintiff, and insured by the policy within mentioned, and then lying in the warehouses of the *Havannah*, where they had been deposited when the said vessel was discharged as aforesaid; and that the expences of the repairs of the said vessel were defrayed by the proceeds of the goods of the plaintiff so sold; and the said vessel then proceeded on her voyage, and arrived

arrived in safety at her port of discharge in *Europe*, where the remainder of the said cargo was duly delivered. That the said Defendant, before the commencement of this suit, duly paid to the said Plaintiff the sum due to and claimed by the said Plaintiff as his contribution in respect of his subscription to the within mentioned policy of assurance, as for a general average loss on the Plaintiff's goods insured as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further say, that the value of the said goods so sold at the *Havannah* as aforesaid, was the sum of 1000*l.*; and that the Defendant's proportion thereof in respect to his subscription of 500*l.* to the said policy, as a particular average loss on the said goods, will amount to the sum of 50*l.*, if the said Defendant be liable thereto.

Judgment having been given for the Defendant below in the Court of King's Bench, the cause was removed into the Exchequer Chamber by error, and now

F. Pollock, who appeared on the part of the Plaintiff below, admitted that this case was in all its circumstances the same as that of *Powell v. Gudgeon* (a), in which it was holden, that an underwriter on goods was not liable, where the goods were sold by the master of a ship to defray the expence of repairs rendered necessary by a tempest, to which the ship and goods had been exposed. He admitted the principle laid down by Lord *Ellenborough* in that case, that in considering the losses for which an insurer is liable, *causa proxima non remota spectatur*, but he urged that, both in the argument and judgment of that case, it was taken for granted that the tempest was not the proximate cause of the loss of the goods; and he now contended, that the tempest ought to be deemed the proximate cause, and not the sale. It

(a) 5 *M. & S.* 431.

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was not necessary to constitute a loss, that the article should be destroyed: in *Idle v. Royal Exchange Assurance Company* (b), it was holden there was a total loss; though the ship was afterwards sold. The loss, therefore, must be taken to occur when any thing happens which renders the further pursuit of the voyage unavailing. Where a cargo has been in such a state of peril as to justify abandonment, the assured may treat it as a total loss, and it is expressly found by the jury that, but for the repairs done, the ship could not have proceeded on her voyage; if so, the owners of the goods might have abandoned at the moment the ship was in her peril, and that must be deemed the moment of loss.

Campbell, contra, was stopped.

BEST C. J. The case has been argued with ingenuity, and has been put on a new point; but the rule laid down by Lord Ellenborough in *Powell v. Gudgeon, causa proxima non remota spectatur*, disposes of the question, for the perils of the sea were not the proximate cause of the sale of these goods. The counsel for the Plaintiff below felt this, and, therefore, argued that the goods might be deemed to be lost, when the owners might have abandoned.

But the doctrine of abandonment has been carried far enough. This ship was never in a state to be abandoned, because she was afterwards repaired by the sale of a small part of her cargo. To extend the doctrine of abandonment to such a case as this, would render the business of insurance impracticable; it has only been applied to cases where the ship could not easily be repaired. Here, however, there has been no actual abandonment, and a total loss of the goods could never

(a) 3 B. Moore, 215.

be said to have taken place, while they were in a state in which they might have reached the consignees. It cannot be held, therefore, that these goods were lost when the peril happened at sea; and the effect of a decision which should overrule *Powell v. Gudgeon*, would be unjust, inasmuch as it would throw on the insurer on goods a loss which ought to fall on the insurer on ship. The owner of the ship ought to furnish the captain with funds for repair; if he omits to do so, and the captain is obliged to sell the cargo, he whose goods are sold may claim the value of the owner; and the owner may sue the insurer on ship for the expence incurred in repair.

Judgment affirmed.

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(IN THE EXCHEQUER CHAMBER.)

HAWKEY v. BORWICK.

May 9.

ERROR. The Plaintiff below declared on a bill of exchange, drawn November 12th, 1817, by *P. Campbell* on *W. D. Campbell*, for 500l., nine months after date, payable to the order of the Defendant below. Averment, that *W. D. Campbell* accepted the bill, payable at *Smith, Payne, and Smith's*, in *London*; that Defendant below indorsed it to *Moore*, and *Moore* to the Plaintiff below; that afterwards, when the bill became due, it was presented "at the house of Messrs. *Smith, Payne, and Smith*," who then and there had notice of the several indorsements on the bill, and were requested to pay it; but refused to do so, of all of which premises the Defendant below had notice.

Declaration on a bill of exchange made payable by the acceptor at the house of *S., P., and S.*: averment of presentment at the house of *S., P., and S.* held sufficient, and that it was not necessary to aver presentment to the acceptor or to *S., P., and S.*

The second count alleged a general acceptance by *W. D. Campbell*; a presentment to him for payment on

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the 15th of August 1818; his refusal, and notice thereof to the Defendant below at the same time; by means whereof, and in consideration of the Defendant below's liability to pay, he promised to do so. There were, also, the usual money counts.

The Defendant below pleaded, first, *non-assumpsit*; on which issue was joined. Second, that he did not undertake within six years before the exhibiting the Plaintiff's bill.

The Plaintiff below replied, that the Defendant below did undertake within six years before the exhibiting of the bill. Issue thereon.

The jury found that the Defendant below did undertake in manner and form as the Plaintiff below had alleged against him.

The errors assigned were, that in the first count no presentment to the acceptor was alleged, nor to *Smith, Payne, and Smith*; and that the bill, though presented at the house of *Smith, Payne, and Smith*, might have been presented to an utter stranger to them and to the acceptor.

That the days in the second count were material, and required to be proved as laid; that the promise in that count was merely an inference of law, arising on the alleged presentment, dishonour, and notice of non-payment of the bill; and by the second plea it was pleaded, that the Defendant below did not undertake within six years of the exhibiting the bill, while there was no replication that the suit was commenced by *latus* or otherwise within six years; and although the bill of the Plaintiff below appeared on record to have been exhibited more than six years after the promise laid in the second count, yet by the record it also appeared, that the jury had found generally, that the Defendant below did undertake within six years; which verdict was manifestly untrue and against the record.

That

105 That the damages were general in the whole record; although it appeared that the Plaintiff below was not entitled to damages on the two first counts of the declaration. Joinder.

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E. Lewis, who appeared on the part of the Plaintiff in error, argued the case at some length. But

The Court thought the errors assigned could not be supported, and the judgment of the Court below was Affirmed.

BUSZARD and Others, Assignees of ROBINSON and JONES, Bankrupts, v. CAPEL.

May 11.

TROVER, for two barges, called *Spring* and *Autumn*.

At the trial before *Best, C. J.*, London sittings after *Michaelmas* last, it appeared that the barges had been distrained by the Defendant for rent arrear; that the premises in respect of which the rent became due, were described in the lease as certain warehouses abutting north on the river *Thames*, and west on a wharf for landing goods; that they had been demised to the lessees, with free liberty for them during the demise to land goods, wares, &c. with the rest of the tenants of the lessor at the said wharf. It further appeared, that the boundary wall next the *Thames* was supported or enclosed by certain piles, about ten feet asunder, on which the warehouses (used by the lessees as granaries) were partly erected; that the barges in question were, at the time of the distress, floating on the *Thames* under the wharf or jetty, which, projecting from the granaries, was constructed of wood,

A barge, attached by a rope to a wharf, may be distrained for rent arrear in respect of the wharf and premises attached to it.

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wood, and likewise supported by piles. The barges were attached by a rope to one of the piles that supported or inclosed the boundary wall on which the granaries partly stood. These piles had iron hawsers from top to bottom for the purpose of attaching vessels that frequented the wharf, and were used by any that arrived.

It was objected on the part of the Plaintiffs, that the barge was not on the premises demised, but on a public highway, and therefore could not be lawfully distrained.

The Plaintiffs were nonsuited, with leave to move to set the nonsuit aside.

Spankie Serjt. having on these grounds obtained a rule *nisi* to that effect,

Wilde Serjt. shewed cause. Even if the barge were on the highway, that circumstance would be no answer to the avowry. Supposing the highway to be part of or incidental to the premises demised, as where there is a highway over a down, 2 *Inst.* 132., the remedy for such a distress, if improper, would be by a special writ of trespass; *Fitz. N. B.* 90. Admitting the barge to have been on the highway, it was on it as incidental to the enjoyment of the premises, and liable to be distrained.

But the barge was strictly on the premises demised. Although, *primâ facie*, the soil of a navigable river may be in the crown, yet the owners of wharfs have a right of enjoyment in the soil near their premises, which no stranger can contest, and which may be the subject of a demise. Wharfs, indeed, would be of no value unless the owners had such a right. It is for the purpose of exercising such a right that the lessee takes the premises; and after exercising it to the exclusion of other persons, he is estopped to say that his lessor was not entitled

titled to it. Such rights have often been enforced, *Bishop v. Ware* (a), *Wyat v. Thompson* (b), and are at all events an easement which may be esteemed parcel of the premises demised.

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Spankie contrd. A distress for rent service can only be taken on the land out of which the rent issues. Upon looking at the lease, it is clear the barge was not on the land demised, for the abuttals describe it as bounded on one side by the *Thames*; and whether the plaintiff had a right to make such a demise or not, no part of the river *Thames*, nor any right to an easement on its bed, had actually been demised. [*Park J.* Suppose a barrel of blacking in the act of being hoisted up to a warehouse in the *Strand*, could not the barrel be distrained for the rent of the warehouse?] The barrel in such case is attached to the premises, and has no support independent of them; but the barge floating on the river had a support independent of the rope, which was not used for the purpose of placing the barge on the premises, but to prevent it from floating away. What line could be drawn? Suppose the rope to be slackened out, and the barge, though still attached to the wharf, to float off to the other side of the river, could it have been distrained there? And if not, within what length of rope might it be distrained? Suppose a stranger had attached a pleasure-boat to the wharf, could that also have been distrained? If not, neither could the Plaintiff's barge. The river was neither appendant, appurtenant, nor any part of the thing demised; and the barge being out of the boundary of the premises demised was not liable to be distrained. And the less so for being on a public highway (for such a navigable river must

(a) 3 *Campb.* 360.

(b) 1 *Exp.* 252.

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be deemed), such a distress being altogether prohibited by the statute of *Marlbridge*.

BEST C. J. In this case the Avowant had leased a wharf to the Plaintiff, together with a granary supported by piles on the side of the wharf. What is a wharf? A building which is always an encroachment on a river, because, unless its boundary wall were to extend beyond high-water mark, vessels could not approach. And the barge which is the subject of the present action, was attached to the piles on which the granary was supported.

It is clear that, generally speaking, a thing cannot be distrained for rent arrear except on the premises demised; it is necessary, therefore, to ascertain with precision what were the premises demised in this case. But the wharf is nothing without the privilege of fastening barges to it; and if so, that privilege, where it is enjoyed, forms a part of the property demised: and when a lessee has enjoyed an advantage of this kind under his lease, he cannot dispute his landlord's right to demise it. As to the objection, that this distress was made on a highway, it is not correct to assume that a navigable river is a highway in the most extensive sense of the term. If it were so, a stranger might turn all the barges adrift, and destroy the value of every wharf on the river; but a navigable river is of no use unless it affords facilities for the landing of goods, and it is impossible to admit a doctrine so destructive of the best interests of commerce. When, therefore, a wharf is granted, all is granted which is necessary to the enjoyment of the wharf; and the right of attaching barges is absolutely necessary.

The statute of *Marlbridge* was passed to obviate the oppression of the great lords, and to prevent them from distraining their tenants' cattle while on the road to market;

market; that statute, however, though it gives a remedy to the party distrained on, does not avoid the distress, and it cannot be supposed to extend to a case like this, where the thing distrained was attached by a rope to the premises demised. The short ground, therefore, on which we decide is, that these premises would be useless without the privilege of attaching barges, and if so, that privilege forms part of the subject of demise.

PARK J. The circumstance of the river which bounds the Plaintiff's premises being a navigable river, is not inconsistent to a certain extent with the enjoyment of an exclusive right. The question before the Court is one of the deepest importance; for if the argument for the Plaintiff be correct, all the trade of *London* is at an end. How could goods be landed if the owners of wharfs had not an exclusive right to attach vessels to their wharfs? They have this right concurrently with a right on the part of the public to use the *Thames* as a highway. It is true, that in general a distress can only be taken on the premises demised, but no barge could unload, if the privilege of doing so were not a part of the demise.

BURROUGH J. The abuttals in the lease do not decide this case. There might be evidence to shew the enjoyment of a right beyond.

Rule discharged.

1827.

BUSZARD
v.
CAPEL

1837.

May 11.

TUCKER and Others, Assignees of GILBERT, a
Bankrupt, v. FRANCIS.

Affidavit of
debt by bank-
rupt for as-
signees insuf-
ficient.

THE affidavit to hold to bail in this case was made by the bankrupt, who swore, that, at and before the date and suing out of the commission, the Defendant was indebted to deponent, and as he believed was still indebted to his assignees on a bill of exchange accepted by the Defendant, indorsed by the drawer to deponent, and as he believed still unpaid.

Wilde Serjt. obtained a rule *nisi* to set aside the bail-bond and enter a common appearance, on the ground that this affidavit was insufficient; a payment to the assignees not being incompatible with the truth of it.

Taddy Serjt., *contra*, urged that an affidavit of debt on the belief of an agent had always been deemed sufficient, and that the bankrupt might be esteemed for this purpose the agent of the assignees. In *Cresswell v. Lovell* (a), an affidavit by the assignee without the bankrupt had been holden sufficient, and there seemed to be no reason why an affidavit by the bankrupt without the assignee should not equally avail.

But the Court thought the affidavit insufficient, and the rule was made

Absolute.

(a) 3 T. R. 413.

1827:

CLARKE v. CROFTS.

May 11.

IN this case a verdict had, by consent, been entered, June 17. 1826, for the Plaintiff, subject to the award of an arbitrator appointed under a rule of *Nisi Prius*, with power to settle all matters in difference between the parties, and to direct what should be done by either party respecting the matters in difference, the parties agreeing to obey the award, so as the arbitrator should publish it in writing, ready to be delivered to the parties, or either of them, or if either of them should be dead before the making of the award, then to their respective personal representatives who should require the same on or before the fourth day of *Michaelmas* term then next, or any other day to which the time should be enlarged :

The authority of an arbitrator under a rule of court, which empowers him to deliver his award to the parties or their executors, does not determine by the death of one of the parties before the award is executed.

The Plaintiff died on the 14th of *August*, before the arbitrator published his award. The Plaintiff's executrix then called on the arbitrator to proceed with the reference, and the Defendant objected.

The arbitrator having enlarged the time, published his award in favour of the Plaintiff.

Wilde Serjt., on the part of the Defendant, moved to set aside the award, on the ground, among other objections, that by the death of the Plaintiff the arbitrator's authority was determined; and that, at all events, he could not after that event enlarge the time for making his award. He contended that no man could so bind himself as to lose the power of revoking (*Vynior's* case (a),) and that death had always been held a re-

(a) 8 Rep. 162.

1827.

CLARKE

v.

CROFTS.

vocation in law of an arbitrator's authority, as marriage was of the authority of a feme sole. From the principles laid down in *Milne v. Greatrix* (a), it followed that the circumstance of a party's being engaged by bond or rule of court not to revoke, did not alter the case; he might still revoke, though subject to an attachment or an action of covenant. *Dowse v. Case* (b), which seemed to be against the revocation, had been reversed on error; and in *Rhodes v. Haigh* (c) the death of one of the parties was held to determine the arbitrator's authority. The Plaintiff being dead, the parties were no longer on an equal footing: there was no mutuality between them; and for want of that, the Defendant must be esteemed as released. A rule having been granted,

Bosanquet Serjt. shewed cause. An arbitrator's authority is, generally speaking, no doubt revoked by death, but in this case the Defendant has bound himself by rule of court to do what shall be pointed out by a given individual. The thing to be done has been pointed out, and whatever may be the state of the arbitrator's authority, the Defendant cannot refuse to perform that which he has consented to perform by the rule of court. At all events, he engaged to abide by the verdict, if not altered by the arbitrator, and the verdict still stands for the Plaintiff. That this has been long the understanding of all the courts is clear from the clause which is universally introduced in the rule of *Nisi Prius*, that in case of the death of either of the parties, the award shall be delivered to the personal representative. *Case v. Dowse* was reversed on a mere defect in the record, and no allusion was made to the opinion expressed by this

(a) 7 *East*, 607.(b) 3 *Bingh.* 20.(c) 2 *B. & C.* 345.

Court,

Court, so that it must be taken to be unimpeached. *Tyler v. Jones* (a) is an authority in support of the efficacy of the rule of court. In *Rhodes v. Haigh* other matters were referred besides the matters in dispute in the cause; and there was no provision in the rule for delivering the award to the executors of the parties.

1827.

CLARK

v.

CROFT.

BEST C. J. A motion has been made to set aside the award in this case, on the ground that the authority to arbitrate has been revoked by the death of one of the parties. The general rule of law, no doubt, is, that the death of one of the parties before the award, is a revocation of an arbitrator's authority; but a general rule of law, may be guarded against by contract. There are many instances in which parties may by agreement renounce an advantage cast on them by a general rule of law, and the question is, whether they have done so here? But this point has been expressly determined by the Court of King's Bench. In *Tyler v. Jones* the order of *Nisi Prius* was in words the same as the present. The award was to be delivered to the parties, or any of them requiring the same; "or if they or either of them should be dead before the making of the award; to their respective personal representatives requiring the same." And the Court said, "As the order of reference gave him express power to make his award after the death of either of the parties, it must be intended to give him incidentally the same power of enlarging the time after that event." In *Cox v. Douse* there was an express provision in the rule, that the death of either party should not determine the arbitrator's authority, and the reversal turned on a defect in the record never argued in this court. In *Tyler v. Jones* the Court implied such a provision from the language of the rule,

(a) 3 B. & C. 144.

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CLARKE

v.

CROFTS.

and we have equal ground for implying it here: the rule contains a direction for the delivery of the award to the representatives of either of the parties: but such a direction would be nugatory, if the death of the Plaintiff were to suspend the operation of the rule. Here, therefore, there is an implied undertaking in the parties to bind their personal representatives to an acceptance of the award, and there is no law to prevent a man from so binding himself and his representatives.

As the executors of the Plaintiff would have been bound, if the award had been against the Plaintiff, so likewise is the Defendant. As to the argument derived from the authority of a feme sole being revoked by marriage, it does not apply, unless a case be supposed in which the feme sole has contracted that her marriage shall not be a revocation.

PARK J. The clause for the delivery of the award to the executors of either party was introduced into orders of *Nisi Prius* to obviate the inconvenience that would otherwise arise upon the occurrence of a death. *Tyler v. Jones* is the same as the present case, and the reversal of the decision in *Coxe v. Douse* did not turn upon the present question. Indeed it could not, after the decision in *Tyler v. Jones*.

BURROUGH J. There might have been more colour for this objection, if a verdict had not been taken in favour of the Plaintiff. How is that to be got rid of? It binds equally the party and his executor; and though qualified under the direction of an arbitrator, that qualification was authorized by the consent of each party.

GASELEE J. It is clearly laid down by the cases in both courts, that the death of either of the parties does not determine the arbitrator's authority under a rule
which

which authorizes him to deliver his award to the executors of either party, if either shall die before the award is made.

The rule which has been obtained in this case must therefore be

Discharged.

1827.

CLARKE

v.

CROFTS.

MORGAN v. SHORT.

May 12.

WILDE Serjt., upon an affidavit that the Defendant *Malpractice.*

had been arrested on a *ca. sa.*, and had, in order to procure his liberation, paid the under-sheriff the amount for which it was issued; that he did not know the Plaintiff; had never had dealings with any person of his name; had never been applied to by the Plaintiff; nor had ever been served personally or otherwise with process, or received any notice of the cause of action till he was taken in execution, —

Obtained a rule, calling on the Plaintiff to shew cause why the sheriff should not repay the money so levied, and why the Plaintiff should not pay the Defendant the costs occasioned by the levy, and why service of a copy of the rule on the under-sheriff, and fixing another copy in the prothonotary's office, should not be deemed good service. •

No cause being shewn, the Court this day made the Rule absolute.

1827.

May 14.

BROWN v. MOORE.

Where the affidavit to hold to bail was regular, and the Defendant did not swear that he was unacquainted with the Plaintiff, the Court refused to cancel the bail-bond, on the ground that the Defendant could not find the Plaintiff.

WILDE Serjt. obtained a rule *nisi* to cancel the bail-bond in this case, and enter a common appearance. Upon the affidavits, it appeared that the Defendant's agent, with a view to apprehend the Plaintiff under a warrant for perjury committed in the affidavit to hold to bail, had endeavoured to obtain the Plaintiff's address from his attorney, who refused to give it; that he made enquiry at the house of which the Plaintiff had described himself in the affidavit to hold to bail; that he heard the Plaintiff had taken lodgings there for a week last *February*; that he had sent some clothes; had dressed there once, but had never slept in the house, but that sundry letters had been addressed to him there.

Taddy Serjt., who shewed cause, insisted that the affidavit to hold to bail being regular, the bail-bond could not be cancelled.

The Court observed that the Defendant did not swear he was unacquainted with the Plaintiff; and declined to make the rule absolute, but gave time for putting in bail.

1827.

WILLIAM HENRY NEALE v. Sir T. TURTON and
Others.

May 15.

IN this action the Plaintiff sought to recover 230*l.* 3*s.* of the Defendants, the amount of two bills of exchange. At the trial before *Park J.*, *Middlesex* sittings after *Hilary* term, it appeared that the Plaintiff had supplied the *London Patent Steam Washing Company* with hay, straw, and corn for their horses, that the two bills in question were drawn by the Plaintiff on "The Directors of the *London Patent Steam Washing Company*;" and accepted for the directors of that company by their secretary. The bills were as follow: "Three months after date pay to me or my order the sum of 115*l.* for value received. *William Henry Neale*. Accepted, payable at the bank of *England* per proprietors of the *London Steam Washing Company*, *Isaac Buxton*." It further appeared that the secretary's authority was to accept bills drawn by *Edward Neale* to the extent of 230*l.* 3*s.* and that the Plaintiff was a holder of twenty shares in the company.

The Plaintiff, a holder of shares in a washing company, drew bills on the directors of the company for goods furnished by him and his brother. The bills were accepted "for the directors" by the secretary of the company, who had authority to accept bills drawn by the Plaintiff's brother:

Held, that the Plaintiff could not recover on these bills against the company.

Two objections were raised to the Plaintiff's recovering: first, that the secretary had no authority to accept the bills drawn by the Plaintiff; and, secondly, that the Plaintiff was a partner in the concern, and, therefore, could not sue the Defendants his co-partners.

A verdict was found for the Plaintiff, subject to a rule for setting it aside, and entering a nonsuit.

A rule *nisi* to that effect was accordingly granted upon the objections urged at the trial. *Caster v. Drury* (a),

(a) 18 *Ves.* 157.

1827.
NEALE
v.
TURTON.

and *Holmes v. Higgins* (b) were cited to shew that the Plaintiff being a member of the company could not sue the directors, and it was also urged, that the directors were but the agents of the company, and though they might accept bills themselves, could not delegate an authority to *Burton*.

Taddy Serjt., who shewed cause, contended, that the company, not being a corporation, the circumstance of the Plaintiff holding shares did not constitute him a partner. The partnership consisted of the directors only, in whom vested all the responsibility of the company. But, even if he were a partner, he might sue his co-partners on bills of exchange accepted by them in their individual names, or in their separate capacity of directors of the company, a bill of exchange carrying its consideration on the face of it, and the right to recover on it not being varied by the situation of the parties. Upon such instruments they only were partners who appeared as such on the face of the instrument. If the bills had been accepted for the directors *and company*, the Plaintiff might have been precluded from suing. Then as to authority, the secretary, like the clerk of every company, must be taken to have a general authority to do all acts necessary for carrying on the business of the firm.

BEST C. J. This is an action on two bills of exchange, drawn by *William Henry Neale*, and addressed not to individuals by name, but to the directors of the *London Patent Steam Washing Company*, and accepted for the directors of that company.

At *Nisi Prius* two objections were made to the plaintiff's recovering; the first, that the secretary of the

(a) 1 B. & C. 74.

company

company had no authority to accept this bill; the second, that the Plaintiff was a member of the company. We are of opinion that *Buxton* had no authority to accept. The secretary of a company has not, in general, authority to accept bills, but if he has, it may be proved. The authority proved in the present case was not a general authority, it was an authority to accept bills drawn by *Edward Neale*, whereas the bills in question were drawn by *William Henry Neale*. But the second objection is fatal to this action. It may be admitted, that if a partner were to draw on other partners by name, and they were individually to accept, he might recover against them, because by such an acceptance a separate right is acknowledged to exist. But that is not the case here, for the bills are drawn on the directors of the company, and accepted for the directors. They are the agents of the company, and accept as agents of the company. The case therefore is that of one partner drawing on the whole firm, including himself. There is no principle by which a man can be at the same time Plaintiff and Defendant. We are, clearly of opinion, that these bills being drawn on the directors are, in effect, drawn on the company of which the Plaintiff is himself a member. He cannot be at the same time drawer and acceptor, and the rule, therefore, which has been obtained for entering a nonsuit must be made absolute.

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TURTON.

PARK J. and BURROUGH J. signified their concurrence.

GASELEE J. said, he agreed on the first point; the secretary had no authority to accept bills drawn by *W. H. Neale*.

Rule absolute.

1827.

May 15.

Lord PORTMORE v. GORING.

Upon an affidavit, that no copy or counterpart of a lease on which the Plaintiff had sued was in the possession or power of the Plaintiff, and that the attorney who drew the lease and counterpart had absconded, the Court refused to order the Defendant, who was in possession of the lease, to permit a copy of it to be taken.

UPON an affidavit by the clerk of Plaintiff's attorney, which stated, that this action was brought against Defendant, as assignee of the lessee, under an indenture of lease between the Plaintiff's ancestor and *W. Furlonger*, to recover damages for arrear of rent, and the non-repair of the premises demised; that the Plaintiff's ancestor died in 1823; that the Defendant had paid, and the Plaintiff received rent under the lease, as deponent was informed and believed; that no copy or counterpart of the lease was now in the possession or power of the Plaintiff; that the Defendant was in possession of the lease, as deponent believed; that the attorney who prepared the lease and counterpart, had absconded from the country; and that the Plaintiff could not safely proceed to trial without oyer and a copy of the lease, —

Wilde Serjt. obtained a rule *nisi* for the Defendant to give Plaintiff oyer, and a copy of this lease.

Taddy Serjt., who shewed cause, relied on the rule laid down in *Street v. Brown* (a), and confirmed in *Ratcliffe v. Bleasby* (b), that the Court will only make an order for the inspection and copy of an instrument, where the party who holds it may be considered as a trustee for the party seeking the copy, which the tenant could not be, where the landlord originally had a counterpart of the lease.

(a) 6 Taunt. 302.

(b) 3 Bingb. 148.

Wilde

Wilde contra, insisted, that the rule extended to all cases where both parties had an interest in the instrument; that a lease was essentially the instrument both of the landlord and tenant: and therefore the cases cited, which were concerning a charter-party and a deed of partnership, did not apply. If the Court would not interfere, the Plaintiff must be driven into equity.

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 Lord PORT-
 MORE
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 GORING.

BEST C. J. A court of equity might impose terms on the production of this instrument which we are unable to impose. But the short ground on which we decide, is, that we have no sufficient proof that the counterpart is not in existence; and, therefore, cannot make the the rule absolute.

PARK J. The case is by no means so hard as that of *Street v. Brown*, where two parts of an indenture of charterparty were supposed to have been interchangeably executed, and the part of which the master of the chartered vessel had the custody, was lost at sea with the ship; yet the Court would not compel the charterer, being sued thereon, to grant inspection and a copy of the other part, for the purpose of the Plaintiff's declaring with certainty.

Rule discharged.

1827.

May 16.

STOVELD and Another v. EADE.

Defendant being indebted to Plaintiff, gave him a bill of exchange in 1823 for 2500*l.*, and a warrant of attorney to secure the payment. In 1825, by a deed, reciting that he was indebted to the Plaintiff 5000*l.*, he gave a mortgage to secure that sum, and any advances to the extent of 10,000*l.* In 1826 the estate so mortgaged was sold for 3600*l.*, and the proceeds paid to the Plaintiff. After this an account was stated between Plaintiff and Defendant, in which the bill

UPON a rule for setting aside an execution issued under a warrant of attorney in this case, the Court referred it to the prothonotary to ascertain the facts, and he now reported as follows :

Plaintiffs were bankers to Defendant from a time previous to the making of the bill of exchange hereafter mentioned, and continued as his bankers till the 28th *February* 1826.

On the 5th *December* 1822 a bill of exchange for 2,500*l.* was drawn by one *William Upton* upon, and accepted by, Defendant *James Eade*, and also by his brother *William Eade*. It was payable two months after date, and was not honored when it became due, *viz.*, on the 8th *February* 1823.

On the 19th *November* 1823 Defendant *James Eade*, and his brother *William Eade*, executed a warrant of attorney, authorizing judgment to be entered up against either at the suit of the said Plaintiffs for 5000*l.*, and costs of suit. Defeasance thereon was to secure the sum of 2,500*l.*, and 5 *per cent.* interest for the same, which said principal sum of 2,500*l.* was the amount of a certain bill of exchange drawn by one *William Upton* in favour of the Plaintiffs, upon, and accepted by, the Defendants *James Eade* and *William Eade*, and some time since overdue. And it was agreed that no judgment should be entered up on said warrant of attorney or execution be of exchange was mentioned, among other claims, as an existing debt, and other property was mortgaged to Plaintiff by way of security, which he was not to sell without six months' notice to Defendant. The bill of exchange was not mentioned in the recital of the second mortgage deed.

Plaintiff having after this issued execution on the warrant of attorney, the Court refused to set it aside.

issued,

issued, unless default should be made in payment of the said sum of 2,500*l.* and interest, together with costs.

By indenture dated 11th *February* 1825 Defendant mortgaged certain premises to Plaintiff. This deed recited that a sum of 5000*l.* and upwards was then due to Plaintiffs from Defendant *James Eade*, and it conveyed to Plaintiffs certain freehold and copyhold premises therein particularly described, to secure the said sum of 5000*l.*, and also the repayment of such other advances as might be thereafter made by Plaintiffs to or for the Defendant's use, not exceeding 10,000*l.*

The deed contained a proviso for redemption on repayment by Defendant of the above sums when required: and also a proviso enabling Plaintiffs to sell by public auction or private contract any of the premises so mortgaged as aforesaid, after giving Defendant six months notice to pay off the above sum; and after paying all costs, charges, and expences attending such sale, the residue of such money was to be applied towards discharging the principal monies "due on the security of these presents."

It did not appear that the before-mentioned bill over due for 2500*l.* was secured by this mortgage.

By another indenture of mortgage dated 7th & 8th *November* 1826, other premises were conveyed by Defendant to Plaintiffs as a further and better security, with the same powers and provisoes, and in the same terms contained in the mortgage deed of 11th *February* 1825.

No particular recital was made in this deed of the debt for 2500*l.* due from Defendant to Plaintiffs on account of the dishonored bill for that amount dated 5th *December* 1822, but this mortgage was founded on an account signed by both parties, in which that debt was mentioned.

Salmon Bridge and another estate, part of the premises mortgaged by the deed of 11th *February* 1825, were sold by the Defendant, with the concurrence of the Plaintiffs, on the 9th *May* 1826, for 3600*l.* which sum

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was applied towards the discharge of the debt due to them from the Defendant.

Judgment on the warrant of attorney was signed *December 1st, 1826*, (about three weeks after the last mortgage was executed,) and execution was afterwards issued. The bill for 2500*l.* was never demanded by or delivered over to Defendant.

Salmon Bridge estate was sold between the time of executing the first mortgage-deed and the second.

Plaintiff *John Stoveld* swore in his affidavit that, when the first mortgage was executed, (11th *February 1825*,) the bill of exchange for 2500*l.* was not delivered up to Defendant, nor was the warrant of attorney cancelled, nor did the said Defendant require the same; and if he had required it, the Plaintiffs would have refused to comply with such request, it being well known and understood, that the two transactions were wholly distinct, and not all connected with each other. And that such bill of exchange for 2500*l.*, and such warrant of attorney, were neither of them mentioned in such first mortgage and such running account.

Previous to the execution of the second mortgage (7th & 8th *November 1826*), a debtor and creditor account had been delivered and signed by Plaintiff *John Stoveld*, and also by Defendant, in which the debt due upon the bill of exchange for 2500*l.* for the first time formed a part. The balance admitted to be due on this account from Defendant to Plaintiffs was 526*3l. 6s. 9d.*; and in that account the sum of 2500*l.*, the amount of the bill of exchange, was the earliest sum which became due from the Defendant to the Plaintiffs.

The second mortgage followed this account. The Plaintiff, *John Stoveld*, did not swear that if Defendant had demanded the bill of exchange for 2500*l.* to have been delivered up and the warrant of attorney to have been cancelled when such second mortgage was executed, that he would then have refused to comply with such request.

The

The second mortgage was prepared by Plaintiff's solicitor without any professional man attending on the part of the Defendant at the time it was executed.

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v.
EADE.

Bosanquet Serjt. shewed cause against the rule. The warrant of attorney, or the bill for 2500*l.* was never discharged, and the execution must stand according to the rule in *Clayton's* case. It is true a general payment on account, not specifically appropriated, must be applied to debts in their order of priority; but the sum paid in by Defendant was paid on account of the sums due under the first mortgage, in which the 2500*l.* due on the bill of exchange is not mentioned. Nothing has been paid in on the second mortgage, and there is no authority for contending that the warrant of attorney is merged in the mortgages.

Wilde and *Spankie* Serjts. *contra*, contended, that the warrant of attorney not taking effect by delivery, was not a deed, and consequently was discharged by the mortgages as being the higher security, and it was clear, that such was the intention of the parties, for it would have been useless for the Defendant to stipulate for three months notice of the sale of his freehold property, if he himself might at any instant be taken in execution under the warrant of attorney. Here, the payment made by the sale of the property under the first mortgage not having been appropriated to any specific item in the account, must, under the rule in *Clayton's* case, be applied to the bill of exchange for 2500*l.*, which was the earliest. The appropriation must be determined by the communications between the parties, (*Simpson v. Ingham* (a)), and the reduction of the balance at the time of the second mortgage, shews that it had been so applied.

Cur. adv. vult.

(a) 2 B. & C. 65.

BEST

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STOVELD

v.

EADZ.

BEST C.J. This was a motion to set aside an execution on a judgment entered up under a warrant of attorney, and the Court referred the case to the prothonotary to ascertain and report the facts. Upon his report (which his Lordship now read), it has been contended, that at the time of the execution no debt remained due in respect of the bill of exchange for 2500*l.* for which the warrant of attorney was given, an account having been rendered between the parties, in which that debt makes the first item, and 3600*l.* having been paid to the Plaintiffs generally. It has also been urged that the warrant of attorney was merged in the mortgage, and that there is evidence of an intention in the parties, that it should be given up upon the execution of that further security. This case is entirely distinguishable from *Clayton's case* (a), to which we have been referred. The rule laid down in that case, is, that where there is an account of several items, and money is paid in generally on the account without specific appropriation to any particular item, such money must be applied to the discharge of the several items in their order of priority. But if there be any circumstance to shew that the payment was intended in discharge of any particular item, the rule does not apply. Such likewise is the course of the civil law. Sir *William Grant* says, "The leading rule, with regard to the option given in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But, according to that law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor: 'in re præsentî; hoc est statim atque solutum est; cæterum postea non permittitur.' If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in

(a) 1 *Meriv.* 572.

which

which they were incurred. And, as it was the actual intention of the debtor that would, in the first instance, have governed, so it was his presumable intention, that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was, consequently, applied to the most burdensome debt, to one that carried interest, rather than to that which carried none; to one secured by a penalty, rather than to that which rested on a simple stipulation; and if the debts were equal, then to that which had been first contracted: ‘In his quæ præsentī die debentur, constat, quoties indistinctè quid solvitur, in graviorem causam videri solutum: Si autem nulla prægravet, id est, si omnia nomina similia fuerint, in antiquiorem.’” Is there then in the present case any circumstance which can enable us to determine whether the payment of the 3600*l.* was to be applied in any order other than that of priority? It is clear that this sum, the proceeds of the sale of the *Salmon Bridge* estate, was applied towards the discharge of the 5000*l.* for which that estate was mortgaged, and it nowhere appears that the sum due on the bill of exchange formed any part of that sum; on the contrary, it is treated as a separate transaction.

No authority has been adduced to shew that a warrant of attorney is merged by a subsequent mortgage; and there is nothing unusual or illegal in a party's having two securities for the same debt.

With respect to the supposed intention of the parties, that the warrant of attorney should be abandoned upon the execution of the second mortgage, it would be unsafe to decide upon probabilities on a point which the parties had it in their power to make absolutely certain; if it was intended that the warrant of attorney and bill of exchange should be delivered up, the Defendant might have obtained them, and by so doing have re-

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moved the possibility of doubt; as he has not done so, we see no reason for setting aside the execution, and the rule therefore must be

Discharged.

May 16.

ANN JENKINS and CHARLOTTE JENKINS v.
 BIDDULPH.

In an action against the sheriff for a false return of *non est inventus*, per quod the Plaintiff was outlawed, the Plaintiff cannot recover the extra costs of the outlawry.

THIS was an action against the sheriff of *Herefordshire* for a false return of *non sunt inventi* to a writ of *capias ad respondendum*, issued 6th November 1822 against the two Plaintiffs, at the suit of *John James*, per quod *James* proceeded to outlaw or waive the Plaintiffs, and they were put to a great expence to reverse the outlawry, and their lands were seized into the hands of the king.

The taxed costs incurred by the Plaintiffs in reversing the outlawry were paid by the Defendant, but the Plaintiffs proceeded for the purpose of recovering the extra costs paid by them to their attorney.

At the trial of the cause before *Best C. J.*, at the *Middlesex* sittings after *Michaelmas* term last, the Plaintiffs established the false return, but did not produce any recorded judgment of outlawry, which it was objected on the part of the Defendant they were bound to do; it was also objected that they could not recover extra costs against the Defendant, at all events in a joint action. A verdict, however, was taken for the Plaintiffs to the amount of the extra costs, with leave for the Defendant to move to enter a nonsuit upon the above objections.

Wilde Serjt. accordingly obtained a rule *nisi* for that purpose, and the objections, as to the necessity of producing a recorded judgment of outlawry as the foundation for the action, and as to the Plaintiffs' joining in

the action, were argued at great length; the Court, however, gave no opinion on these points, but decided solely on the claim for extra costs; as to which *Wilde* relied on *Sinclair v. Eldred* (a), where in an action for a malicious arrest, it was holden the plaintiff could recover no damages for extra costs; he cited also *Hathaway v. Barrow*. (b)

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Taddy Serjt. contrd. In those cases the action was between the parties to the original cause, so that the Court could not consistently estimate the costs in two different ways as between the same parties; but where, as in the present case, the Plaintiffs sue the sheriff for misfeasance, and have no claim against the party in the original cause, there is no reason why they should not be indemnified for the whole expence they have incurred. If the Court were to hold otherwise, attornies would have no means of recovering from their clients extra costs, incurred, perhaps, at the client's express request.

Wilde was heard in reply, and the Court took time to consider the various objections.

BEST C. J. now said, This is an action against the sheriff of *Herefordshire*, by two Plaintiffs, to recover damages for a false return to a writ; the sheriff having stated that the parties named in the writ were not found in his bailiwick, when one of them was in fact in his custody. In consequence of this the party issuing the writ proceeded to outlawry against the Plaintiffs.

I was of opinion at the trial, that as this was a joint outlawry, the Plaintiffs could only recover in this action the costs which they had jointly incurred to set aside the outlawry. It has been objected on the part of the Defendant, that no evidence of the record of outlawry

(a) 4 *Tennt.* 7.

(b) 1 *Campb.* 151.

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was adduced at the trial, but it is not necessary for us to deliver any opinion on that point, because we are clearly of opinion that the Plaintiffs cannot in this action recover the extra costs, and the two cases which have been cited are conclusive on the point. As between attorneys and their clients the case may perhaps be different, because the attorney may have special instructions which may warrant him in incurring the extra costs; but in a case like the present the party can only claim such costs as the prothonotary taxes, and there must therefore be

Judgment of nonsuit.

May 16.

STOCKLEY v. CLEMENT.

Advertisement
in a newspaper
as follows:

"To bill-
brokers and
others. Cau-
tion. Reward.
Whereas in-
formation has
been given to
me that at-
tempts have

THIS was an action on the case against the proprietor of the *Morning Chronicle* newspaper, for an alleged libel on the Plaintiff, contained in an advertisement which appeared in that newspaper.

The first count of the declaration alleged, that before and at the time of committing the several grievances by the Defendant thereafter mentioned, the Plaintiff was lawfully possessed of a certain bill of exchange; to wit, been made to obtain the discount of a bill of exchange, bearing date *London, May 26th, 1825*, and purporting to be drawn by one *John Stockley* upon and to be accepted by the dowager lady *P. Turner* for 6000*l.*, with interest, payable twelve months after date, to the order of the said *J. Stockley*,—I do hereby give notice, on behalf of the dowager lady *P. T.*, that she has not accepted such bill, and that if her name should appear on any such instrument, the same has been forged; or her handwriting to the said acceptance of the said bill, if genuine, has been obtained by fraud, in total ignorance on her part of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the said instrument shall be handsomely rewarded. *Thomas Binns.*"

Held, not a libel on *Stockley*, at least without innuendo and proof that he was the person designed to be charged with having forged lady *P. Turner's* name.

a bill

a bill of exchange for the sum of 6000*l.*, bearing date the 26th of *May* 1825, drawn by him, the said Plaintiff, upon, and duly accepted in writing by Dame *Frances Page Turner*, widow, and payable with interest to the order of the Plaintiff twelve months after the date thereof for value received, and the acceptance of and to which bill of exchange of and by the said Dame *F. P. Turner*, was a true and genuine acceptance of and by the said Dame *F. P. Turner*, and the acceptance thereof was written with her own proper hand, and was not a false, forged, and counterfeited acceptance, nor given by her in ignorance of the effect of her handwriting or signature to such acceptance, nor was the acceptance obtained by fraud, or undue or unlawful means.

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That before the time of committing the grievances by the Defendant thereafter mentioned, the Plaintiff had indorsed the said bill of exchange with intention of getting, and had attempted to get the same discounted for his own use and benefit: yet the Defendant, well knowing the premises, but contriving, and wickedly and maliciously intending to injure the Plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects, that he had feloniously and falsely made, forged, and counterfeited, or caused and procured to be falsely made, forged, and counterfeited, and willingly aided and assisted in the false making, forging, and counterfeiting an acceptance purporting and pretending to be an acceptance by the said Dame *F. P. Turner* on or of the said bill of exchange, and that the said acceptance of the said Dame *F. P. Turner* on and of the said bill of exchange was a forgery, or that the Plaintiff had feloniously uttered and published as true a false, forged, and counterfeit acceptance

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of the said bill of exchange, knowing the same to be false, forged, and counterfeited, or that he had obtained and procured the said acceptance of the said bill of exchange by the said Dame *F. P. Turner* by fraud, and by undue and unlawful means; and that the said acceptance had been made and given by her in ignorance by her of the effect of her signature to the said acceptance; and to subject the Plaintiff to the pains and penalties by laws of this kingdom made and provided against and inflicted upon persons guilty of such crimes or offences, or any of them; and also to hinder and prevent the Plaintiff from negotiating and procuring to be discounted the said bill of exchange, and to deprive him of the benefit and use of the same, and to render the same of little or no value, and to vex, harass, and impoverish, and wholly ruin him the Plaintiff, theretofore, to wit, on the 21st October 1825, to wit, at, &c., falsely, wickedly, and maliciously did publish and cause and procure to be published, a certain false, scandalous, and defamatory libel of and concerning the Plaintiff, and of and concerning the said bill of exchange, of which he the Plaintiff was so possessed as aforesaid, in the manner and form of an advertisement or notice in a certain public newspaper or journal called or known by the name of *The Morning Chronicle*, and purporting to be signed and subscribed by the name of one *Thomas Binns*, containing therein the false, scandalous, malicious, libellous, and defamatory matter following of and concerning the Plaintiff, and of and concerning the said bill of exchange, that is to say, "To bill-brokers and others. Caution. Reward. Whereas information has been given to me (meaning the said *Thomas Binns*) that attempts have been made to obtain the discount of a bill of exchange, bearing date *London, May 26. 1825*, and purporting to be drawn by one *John Stockley* (meaning said Plaintiff) upon and to be accepted by the Dowager Lady

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Lady Page Turner, for 6000*l.*, with interest, payable twelve months after date to the order of the said J. Stockley, for value received, (meaning said bill of exchange so drawn by the Plaintiff upon and so accepted by the said Dame F. P. Turner as aforesaid,) and of which the Plaintiff was so possessed as aforesaid, I (meaning the said T. Binns) do hereby give notice on behalf of the said Dowager Lady P. Turner, that she has not accepted such bill (meaning the aforesaid bill of exchange so drawn and accepted as aforesaid, and of which the Plaintiff was so possessed,) and that if her name should appear on any such instrument (meaning the aforesaid bill of exchange so drawn and accepted as aforesaid, and of which the Plaintiff was so possessed as aforesaid,) the same (meaning the name of the aforesaid Dame F. P. Turner) has been forged, or her handwriting to the said acceptance of the said bill of exchange, if genuine, has been obtained by fraud, in total ignorance on her part of the intended effect of the signature: any person who will give positive information to me (meaning said Thomas Binns) of the party in possession of the said instrument (meaning said bill of exchange so drawn and accepted as aforesaid, and of which the Plaintiff was so possessed as aforesaid,) shall be handsomely rewarded. Thomas Binns."

There were other counts, but in none of them was there an express innuendo that the Plaintiff had forged or obtained by fraud Lady Turner's acceptance.

The Defendant pleaded the general issue, and at the trial before Best C. J., *Middlesex* sittings after Michaelmas term last, was permitted to examine Plaintiff's witnesses to the truth of the facts alleged in the advertisement, not by way of justification, but to show *quo animo* the Defendant had printed it, and the absence of malice on his part. An objection was made to the

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reception of this evidence, on the ground that it was not admissible unless the facts had been specially pleaded. A verdict was given for the Defendant, and the objection was reserved for the opinion of the Court.

Wilde Serjt. moved for a new trial, on the ground that the evidence had been improperly received under the general issue. The Court granted a rule *nisi*, but as they ultimately decided on the single ground, that the advertisement was no libel on the Plaintiff, only the heads of the argument are now given.

Taddy Serjt., who shewed cause, contended, first, that the advertisement was no libel on the Plaintiff; or, at all events, could not be applied to him without an innuendo in the declaration, that he had committed a forgery, and proof at the trial in support of such innuendo. He then relied on *Delany v. Jones* (a), as in point, to shew that an advertisement printed *bonâ fide* to obtain information, or to warn the public, was not a libel. At all events, this was a privileged communication, and fell within the rule laid down in *Lake v. King*. (b) If so, the evidence was properly received, not as a justification, but to shew the absence of malice in the Defendant, which went to the gist of the action. *Fairman v. Ives*. (c)

Wilde and *Spankie* Serjts. *contrâ*. It must be implied from the advertisement that the forgery and fraud were to benefit the drawer of the bill; the libel, therefore, clearly applied to the Plaintiff, and did not require any further innuendo than the allegation that it was published of and concerning him. The advertisement amounts to a charge of fraud on the drawer of the

(a) 4 *Exp.* 191. (b) 1 *Saund.* 120. (c) 5 *B. & A.* 642.

bill,

bill, and falls within the same rule as the case of *Brown v. Croome* (a), where it was held that an advertisement in a public paper, strongly reflecting upon the character of an individual who had been declared bankrupt, was libellous, although published with the avowed intention of convening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security, if the legal object might have been attained by means less injurious. As to the argument that this was a privileged communication, no one can be permitted, for the purpose of warning the public, to charge another with fraud in such an unauthorised way. But even if it were deemed a privileged communication, the circumstances under which it was made, ought, as in *Lake v. King*, to have been pleaded before they could be shewn in evidence.

Cur. adv. vult.

Barr C. J. now delivered the decision of the Court. Several questions of great importance, he observed, had been raised, which the Court were not called on to decide. Two objections had been taken by the Defendant; first, that the publication was a privileged one; and, secondly, that it was not libellous. Had the case depended solely on the first of these objections, the Court would have taken time to consider whether it ought not to have been specially pleaded as a justification. In cases where the alleged libel contained matter that would make it a privileged publication, it would probably be better that those facts should be specially pleaded. In the case of *Lake v. King*, the matter was specially pleaded, and circumstances were placed on the record, which showed it to be a privileged publication. The Defendant there pleaded that the

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(a) 2 Stark. 297.

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alleged libel was no more than a petition to a committee of the House of Commons. It would be more prudent, therefore, on the part of those who should in future conduct a similar defence, that such a justification should be placed on the record. But the Court had not to decide the law on that point in the present instance, they being clearly of opinion, on looking at the publication complained of, that it was no libel at all on the Plaintiff; and the declaration did not contain even an innuendo alleging that the charge contained in the publication applied to him. The Court doubted, indeed, even if the declaration had contained such an *innuendo*, whether the publication could be deemed to apply to the Plaintiff. (His Lordship then read the advertisement.) Certainly no libel on the Plaintiff could be implied from what he had read. It merely stated that a bill had been drawn, but it threw no imputation on the drawer. It said that the acceptance was forged, or had been obtained by fraud; but it did not insinuate that the Plaintiff had practised fraud, or committed forgery. Under these circumstances, it was utterly impossible to collect any thing that at all reflected on the Plaintiff. Nor could the Plaintiff himself think otherwise, unless his character was so exceedingly bad that he imagined no person could read the publication without translating it in its worst light, and attributing to himself the offences it imputed to some unnamed person. For these reasons the Court decided that the rule for a new trial should not be made absolute.

Rule discharged.

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NIGHTINGALE v. BARNARD.

May 16.

WILDE Serjt. obtained a rule *nisi* to enter a suggestion in this cause, to deprive the Plaintiff of costs under the *Middlesex* court of conscience act. (a)

The action was brought to recover 8*l.* 4*s.*, the amount of a tailor's bill, and a verdict was taken for the Plaintiff subject to the award of an arbitrator, with an agreement that the costs of the cause should abide the event: the arbitrator found that the demand had been reduced before action by part payment, and directed a verdict to entered for the Plaintiff for 1*l.* 18*s.*

Where, before action, a debt has been reduced under 40*s.* by part payment, the Plaintiff is deprived of costs by the *Middlesex* court of conscience act.

Taddy Serjt., who shewed cause, argued that the Defendant was precluded from making this application,

(a) 23 *G. 2. c. 33.*, which enacts, "That it shall and may be lawful to and for the suitors of the county court of *Middlesex*, together with the county clerk of the said county in county court assembled, or the major part of them, the said county clerk and suitors so assembled, upon any plaint to be entered in the said county court in any suit where the debt or damages shall not amount to the sum of forty shillings, to proceed in a summary way, and from time to time to make such order or decree, orders or decrees, as shall seem to them, or the major part of them so assembled, to be just and agreeable to equity and good conscience. That in case any action of debt, or action upon assumpsit, shall be commenced and prosecuted in

any of his majesty's courts of record at *Westminster*, and the defendant or defendants, at the time of such action brought, shall live or reside in the said county of *Middlesex*, and be liable to be summoned to the said county court, and the jury, upon the trial of such cause, shall find the damages for the plaintiff under the value of forty shillings, unless the judge shall in open court certify on the back of the record, that the freehold or title to the plaintiff's land principally came in question, or that an act of bankruptcy principally came in question at such trial, then and in such case no costs shall be awarded to the plaintiff, but the defendant shall be entitled to and recover double costs of suit.

by

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by the agreement that the costs should abide the event of the award; but at any rate, in *M^cCollam v. Carr* (a), the Court refused to allow a suggestion under this act where an original debt above 40s. had been reduced below that sum upon a balance of accounts.

BEST C. J. According to the *Middlesex* court of conscience act, in any suit where the debt or damages shall not amount to 40s., that court may proceed in a summary way, "And if any action of *assumpsit* or debt shall be brought in any of his majesty's courts at *Westminster*, and the Defendant shall reside in *Middlesex*, and the jury shall find damages under 40s., unless the judge shall certify, no costs shall be awarded to the Plaintiff." A reduction of the original debt by set-off has been holden not to bring a party within the operation of this statute; for the Plaintiff may not be aware of the amount of the set-off against him; but if the debt be reduced by payment, he must know it, and is thereby precluded from suing for the residue under 40s. in the superior court. The decision in *M^cCollam v. Carr* turned chiefly on the ground, that the contract between the parties was entered into on the high seas. *Eyre* C. J., indeed, says, "Is there any case where the ultimate balance of an account only being under 40s. the Court has allowed a suggestion? I should pause upon such a case, since the most intricate point in accounts between merchant and merchant might by this means come to be decided in the county court." But if the account be reduced by payments below 40s., there does not seem much ground for alarm. However, in *Bateman v. Smith* (b), a decision also on this *Middlesex* act, and where the sum demanded was cut down by the plea of infancy, Lord *Ellenborough* says, "It is assuming the

(a) 1 B. & P. 223.

(b) 14 East, 301.

whole question here, to say that the original debt was above 40s., for the jury have found the damages to be under 40s.," which seems to obviate the objection made by *Eyre C. J.*

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PARK J. In *Clarke v. Askew (a)*, the authority of *McCollam v. Carr* was doubted, and a debt reduced below 40s. by part payment before action brought, was held to be within the *Southwark* court of request's act.

BURROUGH J. A set-off admits the existence of the Plaintiff's debt, and that is the reason why it will not take a case out of the statute; but by a part payment, of which the Plaintiff must be cognizant, his debt is at once reduced.

GASKLEE J. concurred.

Rule absolute.

(a) 3 *East*, 28.

KELLEN v. BENETT.

May 18.

THIS was an action against the owner of a whaling ship, for seaman's wages. At the trial before *Best C. J.* *London* sittings after last *Hilary* term, the captain of the ship being called as a witness on the part of the Defendant, was found to be interested, and being asked whether he would release his interest, refused to do so, whereupon a verdict passed for the Plaintiff, who had been taken on board by the captain at *New Zealand*; rendered him incompetent), had misapprehended the effect of the release, and was now ready to execute one.

The Court refused to grant a new trial on an affidavit that a witness (called on the part of the Defendant, and who had refused to release an interest which

had

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had served ten months on board the ship, and at his departure, had received the following certificate from the captain: "These are to certify that *John Kellen* has served ten months on board the ship *Vansittart*, is an excellent whalesman, and worthy the situation as headsman. He is a sober and discreet man. W. B."

Wilde Serjt. moved for a new trial upon an affidavit by the captain, that he did not at the trial understand the meaning of releasing his interest; that he was now ready to release it; that, in truth, he had no interest; his recompence as captain consisting of a certain portion of the oil obtained in the voyage; and that, by the practice of the trade, the owner could not set any kind of charge against that portion.

This was confirmed by an affidavit of the Defendant and another.

Taddy Serjt., who shewed cause, produced an affidavit on the part of the Plaintiff, deposing that the Defendant had upon one occasion referred him to the ship's husband for payment, though he afterwards refused, and said, that if the Plaintiff recovered at law, he would deduct the amount from the captain's share of oil. It was also deposed, that when an additional hand was taken on board to assist in the course of a voyage, it was the practice to charge the expence of his wages against the oil to be divided between captain and crew.

It was then observed, that the Defendant had not sworn to merits; that the captain's interest was clearly established; and that it would be a most dangerous precedent to permit a witness thus to retract what he had said at the trial. And

Best C. J. saying that the nature of the required release was repeatedly explained to the captain at the trial,

The

The Court thought it would be too much to disturb the verdict upon such an affidavit, when, from the absence of any deposition to merits, it was probable the result of a second trial would not differ from that of the first, and when the witness in question must be placed in the box under circumstances so suspicious.

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Rule discharged.

SPRATT and Another, Assignees of LYNCH, a Bankrupt, v. HOBHOUSE, Bart., and Others. May 18.

ASSUMPSIT for money had and received to the use of Plaintiffs, as assignees, and upon an account stated with them.

At the trial before *Best C. J.*, *London* sittings after last term, the case proved was in substance as follows:

Lynch being possessed of the lease of a public-house called the *Crooked Billett*, became indebted to the Defendants, his brewers, (who carried on business under

L., who held the lease of a public-house, was indebted to Defendants 1275*l.*, and had deposited his lease in their hands as security.

T., who had 650*l.* in De-

fendants' hands, purchased *L.*'s lease for 1690*l.*, the Defendants agreeing to advance him enough to make up the purchase-money, on retaining the lease as a security.

L., *T.*, and the Defendants' clerk met to complete the transfer, when *T.* drew a draft on the Defendants in favour of *L.* for 1690*l.* The Defendants' clerk received this draft, and on *L.*'s executing the transfer of the lease, gave him a draft on the Defendants for 415*l.*

On the evening of that day, *L.* having previously committed acts of bankruptcy, a creditor of his gave the Defendants' clerk notice not to pay the draft, as a docket would be struck against *L.*

Another of the Defendants' clerks, in consequence, refused payment when the draft was presented the next day, having also received a similar notice from the Plaintiff, another creditor of *L.*'s. The Defendants, some days afterwards, paid the draft to a banker who presented it, but not till he had executed an indemnity:

Held, that the Plaintiff, as assignee of *L.* under a commission of bankruptcy subsequently issued, might sue the Defendants in an action for money had and received for the amount of this draft.

Held, also, that the Defendants had, before payment of the draft, sufficient notice of the bankruptcy.

the

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the firm of *Whitbread and Co.*) to the amount of 1275*l.* 14*s.* 7*d.*; as a security for which sum, he deposited his lease in their hands.

After this, becoming embarrassed, he sold by auction his interest in the *Crooked Billett* to *Temprell*.

On the 6th of October 1826, there remained due from *Temprell* to *Lynch*, in respect of this purchase, 1690*l.* 3*s.* 11*d.*; and at that time *Temprell* had in the Defendant's hands, the result of previous dealings with them, 650*l.* *Temprell* being unable to pay the 1690*l.* 3*s.* 11*d.* to *Lynch* at the day appointed, the Defendants agreed to advance him 1040*l.* 3*s.* 11*d.*, which, in addition to the 650*l.* already in their hands, would enable him to meet his engagement. The consideration for this advance was, that they should retain in their hands, by way of security, the lease of the *Crooked Billett*, taking thereupon *Temprell* as their debtor, instead of *Lynch*, for the 1275*l.* 14*s.* 7*d.*, due from *Lynch*.

Accordingly, on the 6th October, *Temprell*, *Lynch*, and *Dodson*, the Defendants' clerk, met together, when *Temprell* drawing a check on the Defendants in favour of *Lynch* for 1690*l.* 3*s.* 11*d.*, *Dodson*, who received it, upon *Lynch*'s executing the transfer of the *Crooked Billett* to *Temprell*, gave *Lynch* the following draft on *Whitbread and Co.* for 414*l.* 8*s.* 6*d.* (the sum remaining to make up 1690*l.* 3*s.* 11*d.*, after deducting the 1275*l.* 14*s.* 7*d.* due from *Lynch* to Defendants.)

" London, 6th October 1826.

" Messrs. *Whitbread and Co.*

" Pay Mr. *Lynch* or bearer, four hundred and fourteen pounds eight shillings and sixpence.

" 414*l.* 8*s.* 6*d.*

" *Thomas F. Dodson.*"

Temprell

Temprell was thereupon let into possession of the *Crooked Billett*.

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Lynch having committed acts of bankruptcy in *July* and on *September 28th* preceding this transaction, on the evening of the *6th of October* a clerk of *Currie and Co.*, one of *Lynch's* creditors, gave *Dodson*, the Defendants' clerk, notice not to pay *Lynch* the above draft, as a docket would be struck against him; and when the draft was presented the next morning by one of *Lynch's* friends, *Ball*, another of the Defendants' clerks, in consequence of this notice, refused payment. That same morning, the *7th*, *Spratt*, the Plaintiff, also a creditor of *Lynch's*, told *Ball* not to pay the draft, as a docket was about to be struck against *Lynch*. The draft was afterwards presented by the bankers of *Currie and Co.*, when the Defendants refused to pay it without a guarantee, which being given, it was paid by them on the *12th October*.

On the *11th of October* a docket was struck against *Lynch*, and a commission of bankrupt issued against him on the *18th*.

The Chief Justice left it to the jury to determine whether the Defendants, before paying the draft for *414*l.**, had received notice of *Lynch's* having committed an act of bankruptcy; and whether the transaction between *Temprell* and the Defendants' clerk was equivalent to a passing of money.

The jury found for the Plaintiffs, damages *414*l.**, and that the transaction between *Temprell* and the Defendants' clerk was the same as if money had passed.

Wildc Serjt. moved for a rule *nisi* to set aside the verdict and enter a nonsuit instead, or have a new trial, on two grounds;

First, that the transaction between *Lynch*, *Temprell*,
and

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and the Defendants, did not amount to a receipt of money to the use of *Lynch*; and

Secondly, that the Defendants had no notice of the act of bankruptcy committed by *Lynch*, or that if they had, they might, after notice, lawfully pay a check given before notice. *Wilkins v. Casey*. (a)

Taddy Serjt. shewed cause. As soon as the arrangement was concluded between the Defendants, *Lynch* and *Temprell*, *Lynch* might have sued the Defendants for the 414*l*. In *Tatlock v. Harris* (b), *Buller J.* said, "Suppose *A.* owes *B.* 100*l.*, and *B.* owes *C.* 100*l.*, and the three meet, and it is agreed between them that *A.* shall pay *C.* the 100*l.*; *B.*'s debt is extinguished, and *C.* may recover that sum against *A.*;" and reference was made to *Israel v. Douglas*. (c) But if *Lynch* could have sued the Defendants, it could only have been on the ground, that as the result of the transaction between the three, they had money of his in their hands. And the principle that money remaining due to one upon an arrangement of debts and credits between three parties, is to be considered as money had and received to the use of that one, has been recognised by many authorities. *Wilson v. Coupland* (d), *Glyn v. Baker* (e), *Com. Dig. Action on the Case, Assumpsit*, B. 15.

Then the Defendants had notice of the act of bankruptcy in time to have prevented them from paying the draft. In order to render it imperative on the Defendants not to pay that draft, it is sufficient that they had probable grounds for believing that *Lynch* was bankrupt, *King v. Leith* (f); it was not necessary they should have formal notice of a commission against him. That they

(a) 7 T. T. 711.

(b) 3 T. R. 180.

(c) 1 H. Bl. 239.

(d) 5 B. & A. 228.

(e) 13 East, 509.

(f) 2 T. R. 141.


had

had such probable grounds is clear from their conduct in refusing payment at first, and in afterwards exacting a guarantee. As to their being bound to pay, after notice of an act of bankruptcy, a draft they had given before, the case is altogether different from *Wilkins v. Casey*, for the draft here not being drawn on a banker was a mere nullity without a stamp, while in *Wilkins v. Casey* there was a bill of exchange accepted by a broker, before notice of any act of bankruptcy, for goods sold to his principal; and Lord *Kenyon* held, that the receipt of the acceptance by the vendor, was of itself equivalent to payment, the bill being afterwards honoured. Here, the draft being a nullity, there was no payment. At all events, the statute 6 G. 4. c. 16. s. 82, 83. protects only payments to the bankrupt without notice: this was not a payment to the bankrupt, but to one who had the draft from him.

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Wilde contrd. The transaction between the parties amounted in effect to a loan from the Defendants to *Temprell*, out of which loan *Temprell* ordered them to pay 414*l.* to *Lynch*; but the money in their hands with which to pay that sum belonged to *Temprell*, and not to *Lynch*. In case of non-payment, *Lynch* must have sued *Temprell* for the amount, and not the Defendants. In all the cases cited, the Defendants had money of the bankrupts in their hands; those cases, therefore, are inapplicable to the present, where the money belonged in effect to *Temprell*, and not to the bankrupt. At any rate, the Defendants had received no notice of *Lynch's* being a bankrupt at the time they made the payment to the holder of the check, who was for this purpose to be considered as *Lynch's* agent. According to the late bankrupt act, there must be an actual notice of an act of bankruptcy to render parties responsible for payment; but notice of a docket can never be

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considered as actual notice of an act of bankruptcy; since it is often struck when no act of bankruptcy has been committed, and often is abandoned. In *Bogaker v. Somerby* (a), the issuing a commission was held, not of itself a sufficient notice to all the world of a prior act of bankruptcy. The intelligence received by the Defendants might raise their suspicion, but it was not intelligence which could justify them in refusing a payment which they were authorized by *Temprell* to make on his behalf.

BART C. J. This is an action by the assignees of *Lynch*, a bankrupt, to recover from the Defendants £14*l.*, paid by them to the order of *Lynch* subsequently to his bankruptcy; and it has been objected in the first place, that, under the circumstances of this case, an action for money had and received, will not lie against the Defendants. I am clearly of opinion, on the authority of many decided cases, that the action may be supported. It has been urged that *Lynch* never had any money in fact in the hands of the Defendants, and that the transaction between them, *Temprell* and *Lynch*, amounts to no more than a loan to *Temprell*. But when the transaction was concluded, the result was, that the Defendants had in their hands £14*l.* of *Lynch*'s money. The justice of the case, therefore, is clear. Still if the form of action is wrong, the Plaintiff cannot recover. But it has been established ever since the case of *Longchamp v. Kenny* (b), that if a party gives another what may be readily turned into money, it may be treated as such in an action for money had and received. The circumstances of that case were, that the defendant had got possession of a masquerade ticket, which the plaintiff had received from Mrs. *Cornely*, to dispose of and to account for after the masquerade, by paying the value

(a) 4 B. & A. 523.

(b) Doug. 137.

of returning the ticket. When the defendant was called on by Mrs. Cornely to account he refused to do so, whereupon she threatened to arrest the plaintiff, who then paid her five guineas, the value of the ticket, and sued the defendant for so much money had and received to his use. It was holden that the action lay for him, and that case goes far beyond the present. In *Pickard v. Banks* (a), where a stakeholder receiving country bank notes as money, and paying them over wrongfully to the original staker after he had lost the wager, was held answerable to the winner in an action for money had and received, Lord *Ellenborough* said, "Provincial notes are certainly not money, but if the defendant received them as money, and all parties agreed to treat them as such at the time, he shall not now turn round and say they were only paper and not money, as against him it is so much money received by him." In a case tried before me at *Lincoln* Summer assizes 1825, *Fox v. Cutworth*, country bank notes had been received to the use of the plaintiff, who sued for money had and received; and the Court of King's Bench held afterwards, in a motion for a new trial, that if they had been received as money, they might be sued for as such. But *Wilson v. Coupland* is in point to the present case; there the plaintiffs were creditors, and the defendants debtors to *Taillason* and Co. for money had and received; and by consent of all parties, an arrangement was made that the defendants should pay to the plaintiffs the debt due from the defendants to *Taillason* and Co.; and upon this transfer of the credit, it was holden the plaintiffs might recover against the defendants in an action for money had and received. The principle in all the cases is, that if a thing be received as money, it may be treated and recovered as such. In the present

(a) 13 *East*, 20.

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case the transaction between the parties was treated as a money transaction. *Temprell* had engaged to pay *Lynch* 1690*l.*, towards which he had but 650*l.*, when the Defendants engaged to supply him with the rest. He then says to the Defendants, write off what *Lynch* owes you, and I will take the debt upon myself; upon this transfer he remains their debtor to the extent of 1040*l.* But 414*l.* remained to be accounted for to *Lynch*, after he had been discharged from his debt to the Defendants, and for that 414*l.* they in effect agreed to become his debtors. From that moment he might have sued them in an action for money had and received; money which the Defendants held to his use, and consequently to the use of his assignees.

The action, therefore, is maintainable, unless, according to the recent statutes concerning bankrupts, the Defendants have paid the money without notice of the Defendants' having committed an act of bankruptcy. It has been urged, indeed, that the notice, if received, was of no effect, not having been given till the money was bound in the Defendants' hands by the issuing of their draft; and *Wilkins v. Casey* is referred to as an authority in support of this position. But in *Wilkins v. Casey* the party bound had given his acceptance to a bill of exchange; and if the draft in the present case were equally binding on the Defendants as a bill of exchange, they would come within the principle of that case.

Such, however, was not the case. The draft given by the clerk on his employers was a mere memorandum; for any other purpose it was a nullity; for the only instrument recognised by the stamp-act as a check must be drawn on a banker within ten miles of the drawer. As a negotiable instrument, therefore, this was not binding on the Defendants at the time it was signed by their clerk, and it was not presented at their counting-house till some days after. Had they then in the interval received

ceived notice of *Lynch's* having committed an act of bankruptcy? I am far from saying that, under the 6 G. 4. c. 16., notice of a docket is to be esteemed notice of an act of bankruptcy. The jury or the Court must be satisfied that the party has been apprised that an act of bankruptcy has been committed. I do not infer that, upon the present occasion, from the single circumstance of the Defendants having received notice that a docket would be struck; but joining that to the circumstance of their refusing to pay till they had received an indemnity, I can have no doubt that they were aware of *Lynch's* situation when they made the payment. On the other side of *Westminster Hall*, direct notice of an incumbrance has never been esteemed necessary to fix a purchaser; it is enough if he has been fairly put on his guard. The rule is, that where a purchaser could not have satisfied himself with a title but by looking at a deed which was necessary to complete the title, he shall be holden to have done so: otherwise he must take the consequence of *crassa negligentia*. According to the late acts, a party paying money after a bankruptcy is not liable to refund, unless at the time he was apprised of the circumstance; but he may be apprised in various ways; and though notice of a docket may not of itself be esteemed notice of a bankruptcy, yet, connecting such a notice with the circumstance of the Defendants' requiring security before they made the payment, no jury could doubt that they had been sufficiently apprised of the act of bankruptcy.

PARK J. I am clearly of opinion that this verdict ought not to be disturbed. According to all the cases, that which has been treated as money by the parties must be considered as such by the Court. Such was the language of Lord *Ellenborough* in *Pickard v. Bankes*. And the case of *Wilson v. Coupland* seems precisely in point for the Plaintiff. But, independently of all autho-

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rity on the subject, can any man doubt that the Defendants held money for the use of *Lynch*? At the close of the transaction, by the draft which their clerk gives, they admit that they have 414*l.* of *Lynch's* money, after retaining 1275*l.* for themselves.

With regard to the notice of the act of bankruptcy, the language of 6 G. 4. c. 16. s. 88. is, "That the issuing a commission shall be deemed notice of a prior act of bankruptcy, if the person to be affected by such notice may reasonably be presumed to have seen the same." I reject the notion that notice of an intention to strike a docket is of itself sufficient notice of an act of bankruptcy. But, under all the circumstances of the present case, would not a jury be justified in finding that the Defendants were apprised of *Lynch's* bankruptcy; and if the Court see that it was impossible for a jury to have drawn any other conclusion, there is no ground for interfering with the verdict. When we see that the Defendants did not pay till some days after the draft was presented, and then required an indemnity, it is impossible to doubt that they were apprised of *Lynch's* situation.

BURROUGH J. It is sufficient if the Defendants have notice of *any* act of bankruptcy; it is not necessary that the notice should apply to the particular act on which a docket is struck. There can be no doubt, from the conduct of the Defendants, that they were apprised of *Lynch's* bankruptcy.

GASHLEE J. Enough had been done to put the Defendants on their guard, and we must infer from their conduct that they were apprised of *Lynch's* situation. If they had good reason to believe that he was a bankrupt, they ought to have acted on it; it was not necessary that they should be absolutely certain of the fact,
 for

for notice does not mean knowledge. As to the Defendants being bound to the payment of the money by the delivery of the draft on themselves, there is a material distinction between this case and *Wilkins v. Casy*. The Defendants refused to pay the draft in the first instance, and the parties who took it after that took it subject to every infirmity.

Rule discharged.

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LOOKER v. HALCOMB and Others.

May 19.

TRESPASS for assaulting Plaintiff, seizing him, dragging him about, taking him into custody, forcing him to go ten miles in a cart, and then ten miles more, and imprisoning him twenty-four hours.

The pleadings were of enormous length, but the third plea on which the question in the cause turned, stated that Defendant *Halcomb* was the owner of closes called the *Conygar Hill*, &c., into which, at the time when, &c., the Plaintiff wrongfully, injuriously, and wilfully broke and entered with a waggon and three horses, and wilfully broke down, prostrated, damaged, and spoiled part of the hedges of the same close;

Wherefore *Halcomb*, so being possessed of the close, and the other Defendants, by his authority, gently laid hands on the Plaintiff to carry him before some justice; and this, that he broke them wilfully or for any other purpose than in exercise of his right of way.

It is further stated, that the Plaintiff was wilfully committing damage and spoil to Defendant's property.

Upon this issue, Held, that evidence of the existence of a right of way over the *land in quo* was properly received with a view to shew the character of the Plaintiff's act.

Trespass for assaulting and imprisoning Plaintiff.

Plea, that he was wilfully breaking down Defendant's fences, wherefore Defendant apprehended him, and took him before a magistrate.

Replication, that Plaintiff broke the fences in the *bona fide* assertion of a right of way; with-

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of peace for the county to answer the premises, and be dealt with according to law; and because no such justice was to be found near the close, compelled the Plaintiff to go the distance alleged to the house of *F. Craven*, being such a justice as aforesaid; and because the Defendants, when they arrived at *F. Craven's* house, were informed by a servant, by the order of *F. Craven*, that he would not hear them that day, and because it was late in the evening, Defendants then, at Plaintiff's request, released him out of their custody.

Plaintiff replied, that at the time when, &c., he claimed to have, and reasonably thought he was entitled to have and use, and that there existed a common public highway over the closes in which, &c., in the second (a) plea mentioned, and called the *Conygar Hill*, &c., for all the liege subjects of our lord the king to pass and re-pass; and in the exercise of such claim of right of way, Plaintiff had, with the full knowledge of Defendants, passed and repassed on foot and with carriages divers times before the time when, &c.; wherefore, having occasion to use the way so by him claimed as aforesaid, and at the time when, &c., claiming such right, and believing that he had it, Plaintiff passed and repassed with his waggon and horses over the close in which in the second (a) plea mentioned, and because the fences in the second (a) plea mentioned were obstructing the highway, so that Plaintiff could not pass without breaking down a small part of them, Plaintiff, in order to remove the obstruction, and not for the purpose of doing wilful damage, broke down the said part of said fences, doing no unnecessary damage; which are the same supposed wilful trespass and damage in the second (a) plea mentioned; and Plaintiff continued in the close endeavouring to make a way for himself, his cattle, and carriages, and

(a) By mistake for "third."

to

to claim the right of way, until Defendants at the time when, &c., of their own wrong committed the trespasses in the introductory part of the second (a) plea mentioned; without this that the said supposed trespasses in said second plea mentioned were wilfully committed by Plaintiff, or for any other purpose than in exercise of his claim of right of way. The Plaintiff also new assigned a longer imprisonment than that justified in the plea.

Defendants rejoined, that at the time when, &c., the Plaintiff was in the act of committing wilful damage, injury, and spoil, to and upon the said close, and the hedges thereof; upon which issue was joined.

To the new assignment the Defendant demurred, but the demurrer was not argued.

At the trial before *Burrough J.*, last *Salisbury* assizes, it appeared, that till within the last three or four years, there had been a public road over the close in question, which the Defendant *Halcomb*, an occupier and proprietor of land in the neighbourhood, had stopped up by hedges, and had ploughed over; that the Plaintiff, a small shopkeeper in a neighbouring village, who had always claimed a right to pass over the alleged road, upon the occasion in question, broke down the hedge erected by *Halcomb* at one end of the close, entered the close with a waggon and horses, and was in the act of breaking the hedge at the other end of the close for the purpose of making egress, when *Halcomb* came up. In answer to some violent language addressed to him as to the cause of his proceeding, the Plaintiff said he was working his way home; whereupon *Halcomb*, with the assistance of four of his servants, apprehended the Plaintiff, put him into a cart, and carried him to a magistrate nine miles across the country. It being then late at night, the magistrate refused to hear the parties,

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but told them they might come again the next morning. Halcomb's servants soon afterwards released the Plaintiff at his earnest request, and upon his promising to appear before the magistrate the next morning. The Plaintiff accordingly went to the magistrate the next morning, and waited for Defendant Halcomb four hours, but Halcomb never appeared; whereupon the present action was brought.

In order to shew that he was not trespassing maliciously, or with a view to the wilful injury of the Defendant, but in the *bona fide* assertion of a supposed, if not an actual, right, the Plaintiff called witnesses to shew the right of way over the closes in question. This evidence was objected to on the ground, that no issue had been taken in the pleadings on any supposed right of way, and that, therefore, the Defendant must be unprepared to meet any such testimony; but the learned Judge admitted the evidence, not to establish the right of way, but to shew that the Plaintiff had not entered the close with the view of doing a wilful injury to the Defendant Halcomb. These witnesses established the right of way at the time of the alleged trespass, or at all events that the Plaintiff had good reason to suppose he had such a right; and the learned Judge thinking that, under those circumstances, the Defendants were not authorized in apprehending the Plaintiff under the provisions of 1 G. 4. c. 56., the jury found a verdict for the Plaintiff with 35*l.* damages.

Beaumont Serjt. moved for a new trial on the ground that, as the pleadings stood, the only issue joined, was, on the point whether the trespass committed by the Plaintiff was wilful or not; that under that issue the question to be determined was, whether the Plaintiff's proceeding was designed or accidental; that if the Plaintiff meant to justify his conduct by shewing that he

was

was asserting a claim to a right of way, he ought to have pleaded it, and to have raised an issue on the right of way; but no such issue having been raised, evidence touching such a right was improperly admitted, and operated as a surprise on the Defendant; who, if the Plaintiff had thought fit to raise the question by the pleadings, might have been prepared to shew that no such right existed.

A rule *nisi* having been granted,

Wilde Serjt. shewed cause. The Defendant's plea is framed with a view to the trespass act, 1 G. 4. c. 56. by which, s. 1., justices of the peace are empowered to award satisfaction for damages done by wilful and malicious trespassers and others, wrongdoers to buildings, fences, land, &c.; but by s. 6. are prohibited from interfering where it shall appear that the party trespassing "acted under a fair and reasonable supposition that he had a right to do the act complained of;" or was hunting; or, if qualified and certificated, was in pursuit of game. Unless framed with a view to that act, it is no plea at all, for in no other way could the Defendant pretend to justify taking a party into custody for a mere act of trespass. But it is clear that in that act the word *wilful* is applied in a technical and narrow sense, not simply to signify an act *designed* or *purposed*, but an act done without any color or claim of right. This appears from the word *malicious* being used in conjunction with it, and from the sixth clause, which is incompatible with a more general acceptation. It would have been nugatory, therefore, for the Defendant to have joined issue on the existence of a right of way, and it was unnecessary for the Plaintiff to allege the existence of any such right. If the Plaintiff was acting in the *bonâ fide* assertion of a supposed right, he was not a wilful trespasser within the meaning of the act. With a view, therefore, to explain

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plain the character of his proceeding, to shew that it was not wilful in the sense adopted by the whole of the pleadings, evidence that the Plaintiff was acting in the assertion of a supposed right of way, was properly received; received, not with a view to establish the right of way, which was *not* put in issue, but to qualify the Plaintiff's act, and shew whether or not it was wilful, *i. e.*, without any pretence of right, which *was* put in issue. That was the only material issue which could have been raised on the Defendant's plea: except with reference to the statute the plea had no meaning: but the statute does not apply to every person who goes designedly on the property of another, but only to such as go without any claim of right, and are so poor as to render it a fruitless expence to proceed against them by action.

Bosanquet. The enacting clause of the statute applies to all who trespass wilfully, that is, designedly, on the property of another; the exception in favor of persons who enter in hunting, or in the assertion of a supposed right, is in a separate and subsequent clause; and it is an undisputed rule of pleading that a party who would avail himself of an exemption in a statute must plead it specially. If, therefore, the Plaintiff proposed to justify the trespass by shewing that it was committed in the assertion of a supposed right, he ought to have pleaded the exception in the statute which applied to his case, and to have enabled the Defendant to traverse the allegation that he was acting in assertion of such a right. The issue on the record did not admit of any evidence, except to shew whether the Plaintiff's entry was wilful or not in the ordinary acceptation of the word.

BEST C. J. There is no pretence for this motion. An act of parliament which takes away the right of trial

trial by jury, and abridges the liberty of the subject, ought to receive the strictest construction; nothing should be holden to come under its operation that is not expressly within the letter and spirit of the act. If the courts were to decide upon a different principle, the law which has been the subject of discussion this day would become an intolerable grievance, placing the liberty of the subject in the hands of any owner of property who might think himself aggrieved by a claim of right. In the present case difficulties have been raised on the form of the pleadings; but it is not necessary for us to go further back than the rejoinder on which issue has been taken, and the allegation contained in it has been negatived by the jury. Upon that issue, the evidence adduced on the part of the Plaintiff was properly received at the trial. The language of the rejoinder is, that the Plaintiff was in the act of committing wilful damage, injury, and spoil, to the close and the hedges: I am decidedly of opinion, that under the circumstances of the case the Plaintiff was not, at the time of the supposed trespass, in the act of committing wilful damage or spoil; and that the evidence received was most material to shew the character of the proceeding.

Before disposing of that, however, I shall apply myself to the objection, that if the Plaintiff was acting in assertion of a right of way, he ought to have pleaded that circumstance under the exception in the statute, and that it was the province of the magistrate to decide whether he was so acting or not. Undoubtedly, if the Plaintiff's reply to the Defendant's plea rested wholly on an exception in the statute, the pleadings ought to have been differently framed. But what has been termed an exception in the statute, is no other than a clause explanatory of the meaning of the enacting part, and the language of the preamble sufficiently proves this, "whereas it is expedient that a more summary mode
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than now by law exists of repressing and obtaining satisfaction for damages done to buildings, land, &c. by wilful and malicious trespassers and other wrongdoers, should be provided;"—that means, where persons wantonly trespass. And this is rendered still more clear by the enacting clause, "if any person or persons shall *wilfully* or *maliciously* do or commit any damage, injury, or spoil, to or upon any building, &c." (a) The authority given to the magistrate to decide whether the party has a right or not, is purely directory, and throws no light on the meaning of the enacting clause. But the exemption of persons who go for the purpose of hunting or shooting, shews that the act was only directed against such as commit trespasses without the ability to make compensation in damages. To save the expence of a fruitless action, the law gives a summary redress against persons of this description; but it clearly does not extend to such persons as the owner of a waggon and horses, who are in a situation to make compensation for any damage which they may be proved to have committed. The consequences would be most inconvenient if a different construction were to be put on the act, which was never intended to apply to persons of substance, against whom redress may be obtained in the ordinary tribunals of the country. But even if the class of persons against whom it was purposed to act in the way of summary proceeding had been less clearly indicated, the whole scope of the statute shews that the words "wilfully and maliciously" can apply only to persons who commit trespasses, knowing that they have no claim of right: if a man enter upon land, thinking he has a right of way, there is no pretence for calling him a wilful and malicious trespasser. Would any judge in such a case certify to give a party complaining of such a trespass his full costs? If such a case were within the

(a) 3 G. 4. c. 56.

operation of the statute, any man who cuts a turf in the exercise of a right of common of turbary, might be dragged twenty miles across the country before a magistrate, and obstructed in his lawful pursuits at the will of any one who wished to molest him. The statute can only apply to cases where a party enters having no colour, and knowing he has no colour of right to enter. Looking, therefore, to the issue raised upon the rejoinder in these pleadings, I think the evidence adduced by the Plaintiff was properly admitted to shew the character of his proceedings; — to shew, that it was not, within the meaning of the statute, wilful and malicious.

That evidence shews, that till within three or four years a public right of way existed over the spot in question, and that that right had never been legally put an end to. Can it be said that a man who enters in the assertion of such a right, is to be treated as a wilful and malicious trespasser?

The whole of the Defendant's proceeding appears to have been unwarrantable, and the rule which has been obtained must be discharged.

PARK J. I am of opinion that this evidence was properly received at the trial. For the purpose of establishing a right of way, it would have been clearly inadmissible on these pleadings; it was received, however, not for the purpose of establishing any such right, but merely to explain the conduct of the Plaintiff, and to shew whether his proceeding was a wilful and malicious injury done to the Defendant, or the *bonâ fide* assertion of a right which the Plaintiff conceived himself entitled to.

If *Halcomb* had been the Plaintiff in the action, and had sued *Looker* for a trespass, and it had appeared at the trial that *Looker* had gone over the land in the assertion of a supposed right of way, would any judge have certified to give *Halcomb* costs? assuredly not.

We must put the same construction upon the Plaintiff's conduct

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conduct as if he had been Defendant in an action of trespass, and there being no ground to charge him with having trespassed wilfully and maliciously on the Defendant's property without any colour of right, the rule which has been obtained for a new trial must be discharged.

BURROUGH J. having presided at the trial abstained from giving any opinion.

GASELEE J. I agree that the proceeding of the Defendant was not a wilful and malicious trespass within the meaning of the act. But upon the pleadings also, as they stand, the evidence adduced at the trial was properly received. The rejoinder must be taken with reference to the whole of what is contained in the plea and replication, upon any part of which latter the Defendant might have taken issue; and upon the whole of the previous pleading it is clear, that the word *wilful* is used in the statutory sense, and not simply as equivalent to, *on purpose*. On purpose, indeed, the Plaintiff is admitted to have entered, but the whole of the allegation amounts to saying, that he entered in the exercise of a supposed right, without this, that he entered wilfully; that is, wilfully and maliciously in the statutory sense; in other words, having no claim of right, but merely purposing to do damage to the Defendant.

Rule discharged.

The demurrer to the new assignment was not argued.

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DUNN, Assignee, v. LOWE, One, &c.

May 19.

ACTION on a replevin bond by the sheriff's assignee. By 11 G. 2. c. 19. s. 23, the sheriff, on taking a replevin bond, must ascertain the value of the goods distrained, on oath. Where the under-sheriff administered the oath to *A. B.*, the broker, and there was also written on the margin of the replevin bond, "*A. B.* maketh oath, that the value of the goods within specified is 49*l.* 16*s.* 0*d.*."

There were two issues joined: first, *non est factum*; and, secondly, that the value of the goods in the condition of the supposed writing obligatory mentioned, was not ascertained by the oath of a credible witness duly sworn according to the form of the statute in that case made and provided.

At the trial before *Best C. J.*, *Middlesex* sittings after *Hilary* term, the execution of the bond was proved by the attesting witness; and the under-sheriff of *Middlesex* who granted the bond, proved that *William Gibbs* the broker, who valued the goods, had been duly sworn by him as to the value.

In the margin of the bond was written, "*William Gibbs*, of No. 9, *Bream's Buildings, Chancery Lane*, in the county of *Middlesex*, broker, maketh oath and saith, that the goods and chattels mentioned in and referred to by this bond, are of the full value of 49*l.* 16*s.* and no more, according to the best of this deponent's skill and judgment. Dated the 3d day of *May* 1819.

William Gibbs."

It was objected, on the part of the Defendant, that the broker's oath appearing to have been taken by way of affidavit, there ought to have been an affidavit stamp.

A verdict, however, was found for the Plaintiff, with liberty for the Defendant to move the court on this objection.

Bosanquet Serjt. accordingly obtained a rule *nisi* to set aside the verdict on the second issue, and instead

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thereof to enter a verdict for the Defendant on that issue.

Wilde Serjt. shewed cause. The execution of the bond is of itself conclusive evidence against the Defendant, that the goods have been valued pursuant to the statute, and he is estopped to say, that the broker has not been duly sworn. *Per Bayley J. Middleton v. Bryan. (a)*

The statute 11 G. 2. c. 19. s. 23. only requires that the broker shall be sworn, not that an affidavit shall be taken; and here he was duly sworn by the undersheriff. The writing on the margin of the bond is a mere memorandum or minute of the oath having been taken, and bears no resemblance to an affidavit, being neither a separate instrument, nor having a jurat thereon, nor any notification of the person before whom sworn.

Bosanquet contended, that the writing on the margin of the bond was to all intents a deposition; that, in the face of such a writing, it could not be contended a mere parol oath had been administered; and that the writing ought not to have been received in evidence without an affidavit stamp.

BEST C. J. The question is, whether the second issue has been proved. We should, indeed, overstrain the practice if we were to hold that a writing such as this required an affidavit stamp. The point arises under the statute 11 G. 2. c. 19. s. 23., by which it is enacted, that officers having authority to grant replevins shall take a bond in double the value of the goods distrained, "Such value to be ascertained by the oath

(a) 3 M. & S. 155.

of

of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is authorised and required to administer."

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The under-sheriff must be satisfied on oath of the value of the goods; but the act does not require that the value shall be ascertained by an affidavit in writing: still it is contended that this writing constitutes an affidavit, and that being without a stamp, no admissible evidence has been given of a valuation on oath. The writing is nothing like an affidavit; there is no jurat; and the statement is not made as attesting the fact, but as a mere minute or memorandum for the satisfaction of the under-sheriff.

The rest of the *Court* concurred, and the rule was
Discharged.

LEVI v. MILNE.

May 21.

THE Plaintiff, a bound bailiff, or sheriff's officer, having, in the exercise of the functions of his office, received a warrant to execute a writ of *capias* upon a party who had often eluded his pursuit, knocked at the party's door, and gained admittance. Not respecting the assertion of the servant that no such person as the party named in the *capias* lived there, the Plaintiff proceeded up stairs to search the bed-room, and observing something

The Defendant published some doggerel lines describing the failure of the Plaintiff, Levi, a bound bailiff, to arrest a party of whom he was in search: the lines were

headed by a wood cut, and the Plaintiff was styled "*Levy the Bum.*"

The Plaintiff brought his action: the jury before whom the cause was tried, enquired whether a shilling would carry costs, and being answered in the affirmative, found a verdict for the Defendant.

The Court granted a new trial.

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concealed under the bed-clothes, turned them up, expecting to find the object of his search; but finding a female instead, he ran off. An action was brought against him for the trespass, in which he paid 100*l.* damages.

This circumstance the Defendant, the proprietor of a periodical work, thought fit to represent in the following doggerel, aided by a wood-cut descriptive of the scene:

" L—y THE BUM.

" ' Come, follower, come,'

Says L—y the bum;

' We've rather a shy bird to nab to-day.

So their shandrydan

Mounted master and man,

And o'er *Oxford-street* stones they rattled away.

" ' Is the master at home ?'

Says L—y the bum.

' No master lives here—mine's the house you see.'

' Nay, Ma'am, that's a hum,'

Says L—y the bum;

So up stairs he marched right merrily.

" The chamber-door

Was lock'd—but no more

Cared L—y the bum for lock or key,

Than wine-bibbers for the cork

They can draw with a fork,

So smash went the door, and in walked he.

" Then beneath the bed-clothes

A head sunk and rose,

And then came a squall and a pitiful squeak—

' Fee fo fum,'

Says L—y the bum,

' I smell the blood of the man I seek.'

" Then off they pulled neat,

Quilt, blanket, and sheet;

But instead of the bird he would seize in his nest,

They saw with surprise

A white neck and black eyes,

Ripe lips, rosy cheeks, and a heaving breast.

" Not

" Not Moses the cunning,
 When he found they'd been funning
 Him off with green spectacles not worth a toy;
 Not poor Doctor Caius,
 Who could blister or slay us,
 When he found he had married ' a lubberly boy;'
 " Were struck half as dumb
 As *L—y* the bum,
 When he found himself baulk'd of his destined prey;
 And no dog of true mettle,
 Tied to a tin kettle,
 E'er bolted as swiftly and madly away.
 " But the worst job of all
 Was at *Westminster Hall*,—
 Counsel's speech, judge's charge, jury's verdict, a sum
 Most dismally lost,
 For damage and cost,
 And thus ends the story of *L—y* the bum."

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 W.
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The Plaintiff thereupon sued the Defendant in an action for libel, and at the trial of the cause, *London* sittings after *Hilary* term, *Best* C. J. told the jury that the composition being calculated to render the Plaintiff ridiculous, and to occasion pain to his feelings, was clearly a libel.

The jury having enquired whether a shilling would carry costs, and being answered in the affirmative, found a verdict for the Defendant.

Adams Serjt. moved to set aside this verdict as contrary to evidence and law. He expatiated on the annoyance occasioned to the Plaintiff in being thus made an object of ridicule; the degradation of having a nickname attached to him, which would probably stick by him to the end of life, and the injury likely to ensue to him by the desertion or diminished respect of his friends.

A rule *nisi* having been granted,

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Wilde Serjt. shewed cause. Considering the sphere in which he moves, there is nothing in the composition calculated to render the Plaintiff ridiculous, or lower him in the estimation of his friends. The verses are a mere playful description of an incident happening to the Plaintiff in the course of his business; and as his business or profession must have been known to his friends, the mention of it could not lower him in their estimation. The word *bumbailiff*, with which the Defendant has designated the Plaintiff's office, is that by which his office is commonly known, and is a term gravely employed by the class of society in which the Plaintiff must live. But even if there be any thing ridiculous in the appellation, the evil of ridicule depends in a great degree on the sphere in which the party ridiculed moves. It can never be contended that a common bailiff is lowered in the estimation of persons of his class by being styled a bumbailiff. If so, and if there is a probability that a second jury will not give more than nominal damages, the Court will not put the parties to the expence of a second trial for the chance of a result so little different from that of the first. (a) The jury in cases of libel being judges of law as well as of fact, there is no pretence for calling this a verdict against law and evidence.

Adams was about to reply in support of the rule, when he was interrupted by the Court, who informed him that he need not trouble himself, as they were decided in their opinion; and

BEST C. J. said,—It is one of the most beautiful parts of our constitution, that when any thing occurs in one tribunal which appears to be wrong, it may be afterwards corrected by another; so that the interests of a party cannot be prejudiced by a hasty de-

(a) 1 Burr. 664.

cision;

vision; otherwise the trial by jury, instead of being a blessing, would become a source of evil. If the jury were to be made judges of the law as well as of fact, parties would be always liable to suffer from an arbitrary decision. In the present case, the jury have made themselves judges of the law, and have found against it. The publication is most undoubtedly a libel: it imputes misbehaviour to the Plaintiff—states that he acted wrong in his situation as a sheriff's officer, and that he had conducted himself indecorously and indecently,—holding him up in the most ridiculous light; and it has been frequently and long held by all the Judges in *Westminster Hall*, that when such is the case, the party has been libelled. But here the jury took on themselves to find a verdict on the law of a case, in direct defiance of the Judge, and I am therefore of opinion that their verdict should be set aside. My brother *Wilde* has stated, that in cases of libel the jury are judges of the law as well as of fact; but I beg to deny that. Juries are not judges of the law, or at any rate not in civil actions. The authority on which the learned Serjeant has probably grounded his supposition is the 32 G. 3. c. 60., which was the famous bill brought in by Mr. Fox, or more properly by Lord *Erskine*. But whoever reads that act will see that it does not apply to civil actions: it applies only to criminal cases. There is nothing in it that in any way touches civil actions, and the jury, with respect to them, stand in the same situation as they ever have done. I mean, however, to protest against juries, even in criminal cases, becoming judges of the law: the act only says that they may find a general verdict. Has a jury then a right to act against the opinion of the Judge, and to return a verdict on their own construction of the law? I am clearly of opinion that they have not. If they had, the character of individuals would not be protected by the laws

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of the land, but would be always placed under the arbitrary discretion of juries. Being clear that the publication in question is a libel, I am of opinion that the rule for a new trial should be made absolute.

(His Lordship having retired for a few moments, on re-entering begged to correct what might have, perhaps, been misconstrued in what he had lately said with regard to criminal cases. He meant to say, — as I was informed, — that in criminal cases, if a jury found for the defendant even against the law, a new trial could not be granted; but if they found against the defendant, and against law, a new trial might be granted.)

PARK J. If the law be, as laid down by *Wilkes J.*, *Bathurst J.*, and the rest of the Court, in *Wilkes v. Munsley* (a), and as it has always been held, — that whatever is published of a man tending to make him ridiculous, or to prevent others from associating with him, is a libel, — I am clear that the present publication is a gross and scandalous libel.

But, according to the learned Chief Justice's report, the jury at all events decided against their consciences, because, if a shilling would not have carried costs, it is plain they meant to have found a verdict to that extent at least for the Plaintiff. We are bound, therefore, to send the cause to a second enquiry.

BURROUGH J. It is important to consider that the Plaintiff in this case is an officer of the courts of justice; — that upon the occasion in question he was acting in discharge of his duty; — that the vulgar are but too prone to treat such officers with disrespect; — and that it is very necessary they should be protected in the execution of their duty. This is a foul libel, intended to make the

(a) 2 *Wils.* 403.

Plaintiff ridiculous for doing no more than as a sheriff's officer he was bound to do. The jury could have no doubt of the certain effect of such a production, and in considering who was entitled to their verdict, they had no right to mix up the question of costs; their business was to weigh the facts of the case, and upon those facts their own conduct shews that they intended to find the other way. *Buller J.* once said the Courts would not permit a jury to find contrary to the facts of a case.

Lord Mansfield J. It is impossible to read this publication without seeing its libellous tendency. The name given to the Plaintiff is one commonly employed by the lower orders as a term of reproach to persons in his station. The case in *Burrow* does not lay it down as a general rule, that a new trial shall never be granted where it is probable the damages may be small. In that case the jury found for defendants, and Mr. Justice *Rosier* (who tried the cause) reported, that the charge was proved, but the injury was so inconsiderable, that half a crown, or even a much smaller sum, would have been sufficient damages. Lord *Mansfield* said: "It does not follow by necessary consequence that there *must always* be a new trial granted in all cases where the verdict is contrary to evidence; for it is possible that the verdict may still be on the side of the real justice and equity of the case."

Is the verdict here on the side of justice or equity? or if it were given on the ground that the publication is not a libel, or does not apply to the Plaintiff, is it not contrary to evidence? That case might, indeed, have been in point if this verdict had been the result of a mere misconception on the part of the jury; but they indulged themselves in doing that indirectly which they could not do directly; they deprived the Plaintiff of his costs. The rule therefore must be made

Absolute.

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May 21.

KINGSBURY v. COLLINS and ELMES.

Trespass for assaulting and imprisoning Plaintiff. Plea, that he was trespassing on Defendant's close. Replication, that Defendants had nothing in the close except under *R. N. C.*; that before the time when, &c., and before Defendants had any thing in the close, *R. N. C.* demised it from year to year to *W. C.*; that *W. C.* permitted Plaintiff to plant a crop of teazles on condition that *W. C.* should have one half of the crop, and Plaintiff the other, and that Plaintiff entered to cut his teazles, when Defendants assaulted him :

TRESPASS. The declaration alleged that the Defendants seized the Plaintiff, pulled, dragged about, kicked, and pushed him out of a close in the county of *Somerset*, forced him to go before a magistrate, and there imprisoned him for twenty-four hours.

Second count, for assaulting, beating, and imprisoning the Plaintiff.

Third, for assaulting and beating him.

Pleas, first, not guilty.

Second, (as to the assault in the first count), that before and at the time when, &c. Defendant *Collins* was lawfully possessed of the close in the first count mentioned, and Defendant *Elmes* of certain teazles growing in the close; that Plaintiff entered into the close and cut the teazles without the leave of Defendants; that the Defendants requested him to desist and depart, which he refused to do, whereupon Defendants, in defence of their possession of the close and teazles, *mollior manus imposuerunt*.

The third and fourth pleas applied to the same assault, and were in substance the same as the second. The Defendants being alleged to be possessed of the close and teazles in the third plea, and in the fourth, *Collins* being alleged to have been in possession of the close, and to have requested the Plaintiff to depart, and *Elmes* to have acted as *Collins's* servant.

Held, that the replication was a sufficient answer to the plea, though it did not allege that *W. C.'s* interest in the land was continuing when Plaintiff entered to cut the teazles.

The

The fifth plea justified the same assault on the ground only of *Elmes's* possession of the teazles, alleging that *Elmes* requested the Plaintiff to depart, and that *Collins* acted as his servant.

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The sixth plea applied to the assault and imprisonment in the second count, and was in other respects the same as the second plea.

The seventh plea applied to the last-mentioned assault and imprisonment, and was in other respects the same as the third.

The eighth plea applied also to the last-mentioned assault and imprisonment, and was in other respects the same as the fourth.

The ninth applied also to the last-mentioned assault and imprisonment, and was in other respects the same as the fifth.

The tenth, eleventh, twelfth, and thirteenth applied to the assault in the third count, and were *mutatis mutandis* the same as the second, third, fourth, and fifth.

There was no justification of the imprisonment alleged in the first count.

Replication. Issue joined on the first plea. As to the second, sixth, and tenth,

That at the time when, &c. *Collins* had nothing in the close in which, except under *R. N. Curtis*, and before *Collins* had any thing in the close, or *Elmes* in the teazles, *W. Curtis* held the close as tenant from year to year to *R. N. Curtis*: and *W. Curtis* being so possessed, before the said times when, &c. and before *Collins* had any thing in the close, or *Elmes* in the teazles, it was agreed between *W. Curtis* and the Plaintiff and *J. Derrick*, that *W. Curtis* should plough the land, that Plaintiff and *Derrick* should plant teazles and cleanse and work them, and that when the teazles should be arrived at maturity, *W. Curtis* should be entitled to one half

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half of them, and Plaintiff and *Derrick* to the other half: that Plaintiff and *Derrick* did plant, cleanse, and work accordingly; that the teazles arrived at maturity; that the Plaintiff went into the close to gather his and *Derrick's* share of them, and staid there till the Defendants of their own wrong committed the trespasses in the introductory part of the second, sixth, and tenth pleas mentioned.

The replication to the other pleas was the same *mutatis mutandis*.

General demurrer and joinder.

Taddy Serjt. in *Hilary* term last, argued in support of the demurrer. The replication is ill. In order to maintain his action, the Plaintiff ought to have shewn that the estate of *William Curtis*, under whom he claimed, existed at the time of the supposed trespasses. But he has nowhere averred that the interest devised to *William Curtis* before the time of the trespasses continued in him up to that time. The Plaintiff has not confessed and avoided or denied the Defendants' pleas; he has not denied the interest which they claim in the close, and not denying it, in effect admits it by the allegation that they have no interest except under *R. N. Curtis*. But such an interest is incompatible with the continuance of any interest in *W. Curtis*. It appears on the face of the replication that *W. Curtis's* interest was only that of a tenant from year to year, which *R. N. Curtis* might determine by notice, and transfer to the Defendants; the allegation, therefore, in the pleas, that the Defendants were lawfully possessed of the close, is perfectly compatible with the facts alleged in the replication, and being nowhere denied, or shewn to be unavailing as a defence, is a complete answer to the Plaintiff's suit. In addition to this, it is not stated that *William Curtis's* interest

terest continued even at the time of his agreement with Derrick and the Plaintiff.

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Bosanquet Serjt. contrd. The pleas are ill. There is no answer to the imprisonment in the first count; and *mollior manus imposuere*, though in some cases an excuse for an assault, is no justification of pulling, dragging about, and pushing, without an averment of such resistance as rendered such a course unavoidable: *Collins v. Renison (a)*, *Gregory et Ux v. Hill (b)*. But the replication is sufficient. It was immaterial whether *Collins* were in possession of the close, and *Elmes* of certain teazles, or not; for their possession might be perfectly compatible with a right on the part of the Plaintiff to enter and cut certain other teazles, or even the same teazles, in the same close. It is nowhere alleged that *Elmes* was in possession of all the teazles in the close, and the demise by *R. N. Curtis* and *W. Curtis* were a sufficient justification of the Plaintiff's entry. In the allegation that Plaintiff lawfully entered, it sufficiently appears that the estate of *William Curtis* continued at the time of the entry; *Com. Dig. Pleader (C)*, 67.; and the Defendants ought to have shewn that that estate had determined, if they meant to rely on the circumstance. But they have not alleged that, nor that *W. Curtis* granted more than he ought. Provided, therefore, that *W. Curtis* had originally an interest which he could transfer to the Plaintiff, which is nowhere denied, it would be immaterial that his own interest should have determined before the Plaintiff entered. If a tenant for life grant a rent-charge, and then surrenders to the owner of the fee, the surrender does not affect the title of the grantee: *Co. Lit.* 338 *b*. It is not requisite that the continuance of the estate of the grantor of a subor-

(a) *Sayer*, 138.

(b) 8 *T. R.* 299.

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dinate interest should appear: *Attorney General v. Buckeridge*. (a) [Gaselee J. Suppose *W. Curtis's* interest to have been determined upon a notice to quit, might not the Plaintiff still have had his claim to emblements?] *Cur. adv. vult.*

Taddy. A tenant for years is not entitled to emblements [Best C. J. referred to *Eaton v. Southey* (b)], except by the custom of the country, and such a custom ought to have been stated in the replication, if it existed. With regard to the imprisonment, it is not necessary in a plea to repeat all the allegations in a declaration: *Tottage v. Petty* (c), *Serle v. Darford*. (d) The expulsion from the close is justified, and that expulsion could not take place without a certain degree of imprisonment. With regard to the pushing and dragging, *molliter manus imposuit* is a justification of a battery as well as of an assault. *Com. Dig. Pleader* (3 M), 16.

Cur. adv. vult.

BEST C. J. now delivered the judgment of the Court, and, after stating the pleadings, and severely reprobating their prolixity, said,

The facts of the case are shortly these. The Plaintiff complains of an assault and imprisonment. The Defendants, taking no notice of the alleged imprisonment in the first count, answer, we were in possession of a close and some teazles; you came to cut the teazles, and we therefore turned you out. The Plaintiff replies, you might have been in possession of the close and teazles, but you were only so under *R. N. Curtis*, to whom *W. Curtis* was tenant from year to year, and before you had any interest in the premises, he agreed with me and *Derrick* to cultivate teazles, of which he was to have one

(a) *Hardr.* 75. 82.

(b) *Willes*, 131.

(c) *Cas. temp. Hardw.* 358.

(d) 2 *Lutw.* 1435.

half, and I and *Derrick* the other; we cultivated them accordingly, and I entered to take what I planted.

The Court are of opinion, under these circumstances, that it is immaterial in whom the possession of the close was for general purposes. Supposing it to have been in the Defendant *Collins*, if the person from whom he derived title had previously made a demise from year to year, and the party taking under such a demise had planted during his tenancy, the teazles he had planted would have belonged to him as emblements, even though his tenancy should have been determined before they were gathered.


It is laid down by *Littleton*, s. 68. that a lessee at will is entitled to emblements unless he determines his own estate, and though it is otherwise with a tenant for years, who knows the end of his term (a), yet Lord Coke says, "This is not only proper to a lessee at will, that when the lessor determines his will the lessee shall have the corn sown, &c., but to every particular tenant that hath an estate *incertaine*, for that is the reason which *Littleton* expresseth in these words, *Pur ceo que il nad aucun certaine ou sure estate.* (b)" A tenant from year to year does not know in what year his lessor may determine the tenancy by half a year's notice to quit: in that respect at least, he has an uncertain estate: the public interest requires that he who grows a crop shall have a right, where his landlord determines the tenancy, to claim it as emblements; otherwise every tenant from year to year whose holding commences at *Michaelmas*, and who plants his crop early in the spring, may, by a notice to quit given at *Lady-day*, be deprived of the fruit

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(a) "*Que conust le fine de son terme.* Well said *Littleton*! (which knoweth the end of his terme): that is, where the end of the terme is certain: but where the lease for yeares depends upon an uncertainty, it is otherwise." *Co. Lit.* 56 a.

(b) *Co. Lit.* 55 b.

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of his labours whenever the harvest is protracted beyond *Michaelmas*. Therefore, although the tenancy of *W. Curtis* might have been determined before the teazles were mature, yet he and the Plaintiff had a right to enter for the purpose of gathering the teazles which the Plaintiff had planted during the tenancy. It has been objected that it does not appear that *William Curtis's* interest continued at the time of his entering into the agreement with *Derrick* and the Plaintiff; but it is stated that he made the agreement being so possessed (that is, possessed under the demise from *R. N. Curtis*), and upon general demurrer, at least, that is a sufficient allegation of his title. Where a tenancy expires, not by efflux of time, but by some act determining the tenancy, it is for the party who asserts the determination of the tenancy to shew that such act has taken place. A tenancy from year to year can only end by some act on the part of the lessor or lessee, and in that respect differs from a term for a certain number of years. We are of opinion, therefore, that it sufficiently appears upon these pleadings that at the time of the trespasses complained of, the Plaintiff had a right to be in the close in question for the purpose of gathering his teazles, and that the replication is a sufficient answer to the pleas.

The second and third set of pleas justify the imprisonment complained of in the Plaintiff's second and third count, on the ground that he was trespassing on the Defendant's property; but although that might be a justification of a removal, if the Plaintiff could not shew a right to remain where he was, it has never been holden of itself a justification of an imprisonment.

Judgment for the Plaintiff.

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ATWOOD and Others v. PARTRIDGE.

May 23.

THE Plaintiffs declared in covenant, on an indenture, bearing date *October 26th, 1825*, between *Moses Robinson* of the first part, the Defendant of the second, and Plaintiffs of the third; whereby, after a recital that a policy of insurance had been effected on the life of *Moses Robinson*; that he was indebted to the Plaintiffs in the sum of 1500*l.*; that it had been agreed that an assignment of the policy should be made to the Plaintiffs by way of security, and that the Defendant should guarantee the due payment of the premium on the policy, *Robinson* assigned the policy to the Plaintiffs, and Defendant covenanted that *Robinson* should regularly pay the annual premium on the policy, and not do any act to make it void, so long as any thing should remain due from *Robinson* to the Plaintiffs. The Plaintiffs then averred, that divers sums due to them from *Robinson* remained unpaid; that while they were so unpaid, the annual premium on the policy became due; and that the Plaintiffs, in order to keep the policy on foot, had been obliged to pay the premium themselves.

Plea, first, *non est factum*. Second, that *Robinson* did not owe any thing to the Plaintiffs when the premium became due. Third, that on the 20th of *June 1826*, the Defendant became a bankrupt, and that the supposed cause of action, if any, accrued to the Plaintiffs before he became a bankrupt.

At the trial before *Best C. J.*, last *Warwick* assizes, after proof of the assignment of the policy to Plaintiffs, and the continuance of the debt due from *Robinson*, when the annual premium on the policy fell due, *June 17th, 1826*, — it was proved, — that *Robinson* failed to

The Defendant covenanted for the due payment by *A. B.* of a premium upon a policy of insurance effected to secure a debt due from *A. B.* to Plaintiff.

The premium became due *June 17th*, and being unpaid by *A. B.* or the Defendant, was paid by the Plaintiff. *June 20th* the Defendant obtained his certificate under a commission of bankrupt:

Held, his certificate did not discharge him from the amount of the premium.

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pay, and that Plaintiffs paid the premium; but that on the 20th June 1826 Defendant obtained his certificate under a commission of bankrupt.

Upon these facts a verdict was taken for the Plaintiffs to the amount of the premium, with leave for the Defendant to move to set it aside and enter a nonsuit.

Bosanquet Serjt. accordingly moved for a rule ~~not~~ to that effect, on the ground that the premium on the policy was a contingent debt, and as such capable of valuation and provable under the commission, and, consequently, barred by the Defendant's certificate.

A rule having been granted,

Wilde Serjt., who shewed cause, argued, that this was not a contingent debt provable under the commission, according to 6 G. 4. c. 16. s. 56., but merely a breach of covenant, which gave the Plaintiffs a claim for unliquidated damages, and those damages might vary according to circumstances, from the amount of a mere fine for paying the premium a few days too late, to the amount of the whole sum insured, which would have been lost if the payment of the premium had been wholly neglected. At all events, there ought to have been a special plea, stating all the circumstances. The general plea of bankruptcy was not designed to cover such a transaction as the present.

Bosanquet and *Adams* Serjts. in support of the rule, contended, that the premium on this policy was a contingent debt capable of valuation, and for which an action of debt would have lain upon the first omission to pay. The Defendant had not undertaken to pay the premium in case of *Robinson's* failing to do so; in which case it might not have been provable; but had undertaken that at all events it should be paid. And Lord
Mansfield,

Mansfield, in *Ex parte Adney* (a), speaking of a similar undertaking, said, "If it be an engagement to pay at all events without regard to another, it is a debt that may be proved under the commission."

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The Court relieved them from the objection to the plea.

BEST C. J. The plea in this case is proper, if the Defendant can take advantage of it; but it is clear that this is not a debt within the fifty-sixth section of 6 G. 4. c. 16. What are the circumstances of the case? *Robinson* owes the Plaintiffs money. The Defendant does not become a surety for that debt; but *Robinson* having agreed, by way of security, to pay the premium upon a policy of insurance, the Defendant undertakes to guarantee, not the payment of *Robinson's* debt to the Plaintiffs, but of that premium. There was, therefore, no debt due from the Defendant to the Plaintiffs, contingent or otherwise. Upon *Robinson's* failing to pay the premium the Plaintiffs were entitled to recover from the Defendant unliquidated damages, the amount of which might have varied, according to circumstances. If *Robinson* continued alive, as was found by the jury, the amount would have been the premium paid by the Plaintiffs. If *Robinson* had died, it might have been the whole sum insured. How is it possible, then, to say that this was a debt due from the Defendant. In *Ex parte Adney*, the bankrupt undertook to pay a sum certain, in case his principal failed to do so; a sum which could not be varied by circumstances.

1. GASELER J. This was not a debt proveable under the fifty-sixth section of 6 G. 4. c. 16., but a mere claim for unliquidated damages, from which the Defendant was not discharged by his certificate. In *Ex parte Ad-*

(a) 6 Cr. 2. 463.

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ney there was a certain sum to be paid which constituted a debt, and not a demand variable according to circumstances.

BURROUGH J. had left the court, but desired the Chief Justice to express his concurrence in the decision. (a) Rule discharged.

(a) Park J. was absent, being ill.

May 25.

MAGGS, Assignee of FOLLETT, a Bankrupt, v.
HUNT.

The general bankrupt act, 6 G. 4. c. 16., which repealed all former bankrupt acts, came into operation September 1st 1825.

A commission having been sued out September 8th 1825 against F. upon an act of bankruptcy committed by him the July preceding:

Held, that it could not be supported.

TROVER for goods sold by *Follett* to the Defendant in June 1825.

In July that year *Follett* committed an act of bankruptcy, and on the 8th of September following a commission was issued against him.

At the trial before *Gaslee J.*, *Somerset Summer* assizes, 1826, a verdict was found for the Plaintiff, subject to the opinion of the Court, whether the commission sued out in September could be supported by an act of bankruptcy committed in July.

Wilde Serjt. accordingly obtained a rule nisi to set aside the verdict and enter a nonsuit, on the ground, that, by the 6 G. 4. c. 16., which came into general operation on the 1st of September 1825, all the old bankrupt statutes were repealed absolutely. Those acts, therefore, having been repealed at the time the commission was sued out, and the 6 G. 4. c. 16. not being in force when *Follett* committed the alleged act of bankruptcy,

bankruptcy, no statute existed at the time of the commission under which that act could be denominated an act of bankruptcy. There was no clause to give the 6 G. 4. a retrospective operation, which, indeed, would have been an unusual hardship, since that statute created many new acts of bankruptcy, which acts, under the old statutes, would have been perfectly innocent. The 135th section of the statute kept in force commissions issued before the 1st September 1825; but an act of bankruptcy committed before could not support a commission issued after the statute came into operation.

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Vaughan Serjt., in *Hilary* term, shewed cause against the rule. If the construction of the act, which has been contended for, be correct, there will be many cases in which no commission of bankrupt can issue. But as it never could have been the intention of the legislature that the country should be for any period without a bankrupt law, the Court will put such a construction on the statute as will support commissions circumstanced like the present.

The statute was passed in *May* 1825, and though not in force till *September* for the purpose of suing out commissions, might be held sufficiently to have pointed out what should be acts of bankruptcy in the interval; and the 135th section, which directed an exposition beneficial to the creditors, enacted, also, that nothing should alter the present practice in bankruptcy, except where such alteration was expressly declared. The case before the Court must be esteemed to fall under the then present practice, it being one for which no alteration had been declared, and the then present practice meant the practice under the old acts. There was a provision contained in the section of the act touching an act of bankruptcy by lying in prison, which related to a trader in prison "at the commencement of this act;" but there were no such

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words of limitation to be found in the third and fourth sections, which created the various other acts of bankruptcy.

Wilde was heard in support of the rule, and the Court postponed their decision, it being understood that the same question was pending in the Court of King's Bench.

The Court this day made the rule absolute, on the ground that *Follett* was not a bankrupt, no act of bankruptcy having been committed by him since the new statute came into operation.

May 26.

ALICE TETLEY v. JAMES TETLEY and Another.

An annuity of 10*l.* was granted by a son to his parents, in consideration of their giving up to him a farm they had occupied, and the stock on it worth 300*l.*: Held, that the annuity need not be enrolled under 53 G. 3. c. 141.

DEBT on bond, conditioned for the payment of 100*l.* to *William Tetley* and *Alice* his wife, and the survivor of them, in consideration of their having given up to the obligor *James Tetley* the possession of a farm, together with certain carts, ploughs, harrows, and other implements in husbandry, as well as dairy utensils, to the sole use of *James Tetley*. Breach; non-payment of the annuity.

The Defendant pleaded *non est factum*, upon which issue was joined, and the cause went down to trial, though there were also long pleadings, upon which the question whether or not the annuity ought to have been enrolled was raised upon demurrer.

At the trial before *Garrow B.*, last *Stafford Lent* assizes, it appeared that *William Tetley*, the father of the obligor, had given up the farm to his son upon the execution

cution of this bond, together with farming stock to the value of 200*l*. A surveyor stated that, in consequence of previous improvements, the possession of the farm was worth 100*l*.

It was objected that the annuity ought to have been enrolled, but the learned Baron thought otherwise, and a verdict was found for the Plaintiff, with liberty for the Defendants to move to set aside the verdict, and enter a nonsuit.

Taddy Serjt. having obtained a rule *nisi* accordingly,

Wilde Serjt. now shewed cause. He argued that where the grantor's object is to raise money, and the consideration of the annuity is goods, that is, in effect a pecuniary consideration, or money's worth, within 53 G. 3. c. 141.; the object being to convert the goods into money; but where the object is not to raise money, but merely to transfer real property, although some chattels may accompany the transfer, ancillary to the enjoyment of the real property, the transaction is not within the annuity acts, and does not require enrolment. And he referred to *James v. James* (a), *Doe d. Johnstone v. Phillips* (b), *Blake v. Attersoll* (c), *Hutton v. Lewis* (d), *Keats v. Hick*. (e)

Taddy. The 53 G. 3. c. 141. was passed expressly to remedy an omission in the 7 G. 3. c. 26., which did not extend to annuities granted for mere money's worth; the decisions, therefore, under the former statute do not apply; and that statute having been repealed, cannot be said to be *in pari materia* with the 53 G. 3. But if the latter statute be not construed to extend to annuities

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(a) 2 B. & B. 702.

(d) 5 T. R. 640.

(b) 1 Taunt. 356.

(e) 5 B. Moore, 629.

(c) 2 B. & C. 875.

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granted upon the transfer of chattels, the words money's worth will have no further operation than the repealed statute. And there is no decision to the contrary. In *Blake v. Attersoll* there was a mere surrender of a life interest; no money or money's worth passed; and *James v. James* has only decided that a transfer of landed property, though leasehold, is not within the statute. In *Keate v. Hicks* the consideration was natural love and affection.

BEST C. J. Without determining whether these statutes are *in pari materia* or not, it is plain that the object of both of them has been to protect needy persons who may be driven to borrow money of unprincipled lenders, and that they have no application to cases in which there has not been a buying and selling of annuities with a view to effecting a loan.

It is true, that in the second statute, the legislature meant to comprehend a class of cases not adverted to in the first act, but requiring in a still greater degree the interference of the legislature, as being for the most part pregnant with the grossest fraud; cases in which the grantor received as the consideration for the annuity, not money, but goods at a nominal value, which he was usually obliged to dispose of at half the amount of the consideration. In order to check this practice, the legislature required the registration of annuities granted for money's worth as well as money. But the object of the act in introducing the words "for money's worth" is confined to such practices. From the beginning, to the end the word *purchase* is employed to describe the transaction which the legislature had in view, and that word is inapplicable to a transaction such as the present. No one could call this a purchase where parents give up all the stock of their farm, and merely reserve to themselves an annuity of 10*l.* as a trifle to save them from absolute want. They part with property worth 300*l.* and

and require an annuity of only 10%, so that the obvious consideration for the deed is parental affection. If they had been treating with a dealer, they would have obtained a much higher annuity. That there was to some extent a transfer of money's worth, is clear, but the question is, what was the object of the transfer? Was it a transfer for the purpose of raising money, or of making a family settlement? Clearly for the purpose of a family settlement. If there had been no case on the subject, I should have felt no difficulty in deciding that this is not an annuity for money's worth within the meaning of the statute; but the point has been decided in several cases. In *James v. James* leasehold property was transferred, which the Court could not deny to be in one sense money's worth, but they considered what was the object of the parties; and *Dallas C. J.* said, "Money's worth may in certain cases be a pecuniary consideration within the meaning of the act, as where the grantee pays for the annuity in part, or the whole, by goods or merchandize, to be converted into money by the grantor, and where the object of the grantor was to raise money." If the object of the parties is, not to raise money, but to make a settlement, the case is not within the act, although there should to some extent be a transfer of money's worth. This case is confirmed in *Blake v. Attersoll*, where the same principle is laid down by *Bayley J.*: "The 17 G. 3. c. 26. recites, that the pernicious practice of raising money by the sale of life-annuities had of late years greatly increased, and was promoted by the secrecy with which such transactions were conducted; the mischief contemplated in the preamble, therefore, was the practice of raising money by the sale of life-annuities. Now, although the 53 G. 3. c. 141. has not the same large words in the preamble, yet there is sufficient in the other parts of it to shew that the legislature had in view the same object; the recurrence of the word
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purchase in the several clauses shews clearly that the legislature intended to proceed on the same principle, and had in view the same object, viz., the restraining of the practice of the sale of life-annuities." If the object of the annuity is not to buy money, or goods wherewith it may be purchased, the case does not fall within the purview of the statute. In the present instance it is not the grantor who stands in need of protection against the grantee, but a parent against the ingratitude of her child.

GASKELL J. (a) The act exempts from its provisions annuities granted voluntarily, or not for a pecuniary consideration; that must mean where the *object* of the transaction is not pecuniary.

Rule discharged.

(a) *Park J.* was absent, *Burrough J.* was absent at being ill. Chambers.

May 26.

BROOKE v. PICKWICK.

A common travelling trunk of a large size, containing apparel and jewels,

THIS was an action against a coach proprietor to recover damages for the loss of a trunk. At the trial before *Burrough J.*, last *Taunton* Spring assizes, it appeared that the Plaintiff, being about to travel with having been lost by the Defendant, a carrier, either through his having omitted to place it on his coach, or having fastened it there insecurely: Held, he was liable to make compensation to the owner, a gentleman travelling by his coach, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the carrier's office limiting his responsibility to five pounds in the absence of such disclosure, which notice the owner of the trunk, having been in the office, had an opportunity of seeing.

Held, that, under the above circumstances, the jury were properly directed to consider generally, whether the carrier had been guilty of gross negligence, without reference to the nature of the article conveyed.

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his family from *Bath* to *Truro*, took places in company with his daughter at the Defendant's coach-office: that exactly opposite the entrance to the office was a notice painted on board, limiting the Defendant's responsibility to five pounds for parcels or packages, unless booked and paid for as of higher value: it did not appear, however, whether the Plaintiff or his daughter had read this notice or not. The trunk in question, a common travelling trunk of a large size, contained female apparel and jewels; and at *Bath* was safely deposited with two others, likewise belonging to the Plaintiff, in the boot of the coach. At *Taunton*, in the middle of the day, the luggage and passengers were removed to another coach; and the Plaintiff inquiring of the coachman whether his trunks had been taken care of, was told that they had been safely packed on the top of the coach. When the Plaintiff arrived at *Exeter*, the trunk was missed, and some days afterwards was found rifled of its contents in a field about a mile from *Taunton*. There was an assistant on the outside of the coach from *Bath* to *Taunton*, but none from *Taunton* to *Exeter*.

The coachman was not called as a witness.

The learned Judge left it to the jury to find whether the Plaintiff had any notice of the limitation of the Defendant's engagement; and if he had, still, whether the Defendant had not been guilty of gross negligence; in which case he said the Defendant would be responsible, even though the Plaintiff knew of the limitation of his engagement. A verdict having been found for the Plaintiff,

Bosanquet Serjt. moved for a new trial, on the ground of an alleged misdirection. He argued, that supposing the Plaintiff to have had notice of the limitation of the Defendant's engagement, the Defendant was not responsible.

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sponsible. *Marsh v. Horn.* (a) In such case the stipulated payment not having been made, the Defendant was no other than a voluntary bailee, and as such, would discharge his duty by taking ordinary care of the articles committed to his charge, though undoubtedly he would be liable for gross negligence. But ordinary care and gross negligence were relative terms, the import of which depended altogether on the subject matter to which they were applied. What would be ordinary care, or even reasonable caution, with respect to an article of one description, would be gross negligence with respect to an article of a different description. *Batson v. Donovan.* (b) A large trunk might be safely and prudently stowed on the top of a coach, but it would be gross negligence to place in the same situation a jewel case or a parcel of bank notes. A position which might be safe and appropriate for a deal box, might be improper and dangerous for an article marked "glass," or "to be kept dry." The Defendant could have no reason for supposing that a common travelling trunk would contain jewels: unless, therefore, he had been apprised of that circumstance by the Plaintiff, he was justified in placing it on the top of the coach, the usual receptacle for such articles. The jury, therefore, should have been directed to consider, not whether the Defendant had been guilty of negligence generally, but whether he had been negligent with reference to this trunk, the Plaintiff not having apprised him that it was of more value than an ordinary trunk.

Wilde Serjt. contrd. The Plaintiff was not bound to disclose the value of his trunk. No line could be drawn if such disclosures were held necessary in any one instance, and the inconvenience of making them upon all

(a) 5 B. & C. 322.

(b) 4 B. & A. 21.

occasions would be very great. In *Batson v. Donovan*, the parcel being of small size, the Defendants might fairly infer that it was of small value, if uninsured. But whether the trunk were of great or of little value, the Defendant was sufficiently guilty of negligence to warrant the direction to the jury; for either the trunk was never placed on the coach at *Taunton*, or it was insecurely fastened: and though it had been of the smallest value, it would have been gross negligence not to fasten it securely; much more to leave it behind.

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BEST C. J. It is necessary to take a short review of the facts in this case. The Plaintiff took places by the Defendant's coach for the conveyance of himself and family from *Bath* to *Exeter*. Upon getting into the coach at *Bath*, the Plaintiff had with him a travelling trunk of such a size that the proprietor of the coach must have supposed it contained property of greater value than five pounds. At *Bath* the Plaintiff saw the trunk properly deposited in the boot of the coach. At *Taunton* the coach was changed for the convenience of the proprietor, when the Plaintiff expressed his anxiety about the safety of his trunk, and was assured by the coachman that it had been safely stowed on the top of the coach, the second vehicle having been so constructed by the Defendant as to be deficient in that accommodation in the boot which the first afforded. And here it is material to observe, that upon the trial of the cause, the coachman was not called; if called, he could have informed the jury whether the trunk had been properly placed on the top of the coach or not. From *Bath* to *Taunton* there was a person on the outside of the coach, but none from *Taunton* to *Exeter*. On arriving at his destination the Plaintiff missed his trunk, and about two days afterwards it was found a mile out of the road, near *Taunton*. It could only have come thither in one of two ways; either by having been left behind by the coach-

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coachman, or by having been insecurely fastened on the coach. If it was not placed on the coach, the negligence of the Defendant, or of his agents, must have been of the most scandalous description; if it was placed on the coach, the coachman ought to have been called to shew in what manner it was secured. It certainly appears that a notice was fixed up in the Defendant's office limiting his responsibility to five pounds, except where a parcel was disclosed to be of greater value, and paid for accordingly; but it does not appear that the Plaintiff was apprised of the notice, and it by no means follows that he saw it because he was in the Defendant's office. If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and, at the same time, to place in his hands a printed paper, specifying the precise extent of their engagement. If they omit to do this, they attract customers under the confidence inspired by the extensive liability which the common law imposes on carriers, and then endeavour to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them. The merely putting up a board in their office ought not to satisfy a jury that they have been at the pains to make a customer understand beforehand the limitation under which, after a loss, they seek to elude their general responsibility. In the present case, the learned Judge who presided at the trial reports, that it does not appear that the Defendant's notice came to the knowledge of the Plaintiff. If so, he is entitled to recover, whether the Defendants have been guilty of negligence or not; for by the common law of the realm a carrier is an insurer; a responsibility originally rendered necessary by the habits which carriers had in old times of leaguings with thieves; and though coach proprietors of the present day are a respectable and opulent class,

many

many of the persons employed by them resemble those whom the common law meant to guard against. I wish, therefore, that these notices had never been holden sufficient to limit the carrier's responsibility. It is too late, however, now to hold that they are without effect where the customer is distinctly informed of their existence. But though the Judges have holden that they will, in such a case, exempt the carrier from his common law responsibility as an insurer, it has never been decided that they will excuse him from the consequences of gross negligence. If the jury find that there was gross negligence, and they could not find otherwise under the circumstances of this case, the trunk having been lost at mid-day, it is immaterial whether the carrier has been apprized of the value of the article or not. He must have supposed in the present instance, from the size of the trunk and the condition of the passenger, that it was worth more than five pounds; and where is the line to be drawn if passengers are always to disclose the exact value of their luggage? It would be dangerous to extend to cases of gross negligence the doctrine of modern law, that a carrier is not liable as an insurer where he has given notice to limit his responsibility. Under such an extension of the principle, a sea insurer, who subscribed an insurance for 100*l.* on an article worth 1000*l.*, might claim to be discharged from his contract, on the ground that he was never apprized of the value of the thing insured; and I must continue, therefore, to retain the opinion I expressed in *Batson v. Donovan* till the twelve Judges decide I am wrong. That case, however, was such (the parcel sent consisting of bank notes, and the banker having received notice of the limitation of the carrier's responsibility), that it might be thought a particular disclosure of the value of the article ought, under all the circumstances, to have been made, and is, therefore, distinguishable from the present, in which the

Plaintiff's

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Plaintiff's trunk contained no more than a person in his condition might be expected to carry with him. *Marsh v. Horne* has no bearing upon the present case, because the owner of the goods had notice of the limitation of the carrier's contract, and the carrier was not chargeable with gross negligence. There is no ground, therefore, for granting a new trial in the present case, and the rule must be discharged.

BURROUGH J., as having presided at the trial, declined giving any further opinion.

GASELEE J. (a), commenting upon the facts of the case, said, that though no positive act of gross negligence had been proved, enough had been proved to lead the jury to infer that the loss could not have happened without gross negligence on the part of the Defendant's servants; the case, therefore, had, in his opinion, been properly left to the jury, and the rule must be

Discharged.

(a) *Park J.* was absent, being ill.

May 16.

TOOK v. TUCK.

Where Defendant entered into a composition to pay his creditors

6s. 8d. in the

pound, upon condition of being released, and nearly two years afterwards gave one of them, who had agreed to sign the composition deed, a bond for the residue of her debt, without the knowledge of the other creditors; she not having received the amount of her composition, but divers of the other creditors having signed the deed and received their composition: Held, that an action might be sustained on this bond.

That

That before the making of the supposed writing obligatory and condition, (to wit) on the 24th day of December 1818, the Defendant was indebted to *Mary Juler* in a certain large sum of money, (to wit) the sum of 810*l.*, together with certain interest due to the said *M. Juler* thereon; and also to divers other persons in divers other large sums of money: and the said Defendant having before that time become embarrassed in his circumstances, and unable to pay the said *M. Juler* and his said other creditors their just debts aforesaid; in consideration thereof, and that certain friends and relations of the Defendant's had agreed to assist him, the Defendant, in and about the paying a certain composition upon his said debts; it had been agreed by and between the said Defendant and the said *M. Juler*, and the other creditors of the said Defendant respectively, that the said *M. Juler* and the said other creditors would accept and receive a composition, then and there specified and agreed upon, to wit, 6*s.* 8*d.* in the pound upon the amount of their several debts, and would thereupon release and discharge the said Defendant from all claims and demands in respect thereof; and that afterwards, (to wit) on, &c. (to wit) at, &c. divers of the creditors of the said Defendant confiding in the said agreement, did receive of and from the said Defendant the said composition upon their respective debts; and did thereupon in pursuance of the said agreement by a certain indenture, sealed with their respective seals, and bearing date a certain day and year therein mentioned, acquit, release, and for ever discharge the said Defendant of and from their several respective debts and claims upon him the said Defendant in respect thereof; whereof the said *M. Juler* then and there had notice. That afterwards, on the 11th October 1820, (to wit) at, &c. the said supposed writing obligatory was obtained by the said Plaintiff in trust from the said De-

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defendant by fraud and covin, that is to say, that the said Plaintiff, at the request of the said *Mary Juler*, obtained, accepted, and received the same of the said Defendant in trust, to secure to the said Plaintiff the residue of the said debt and interest thereon then due by the said Defendant to the said *Mary Juler*, deducting the amount of the said composition upon the amount thereof, corruptly, unlawfully, and without the knowledge or consent, and in fraud of the other creditors of the said Defendant as aforesaid, and not otherwise howsoever.

Cross Serjt. obtained a rule *nisi* to enter up judgment *non obstante veredicto*, on the ground that the jury had not found fraud, but only the circumstances stated in the plea; and that those circumstances disclosed no fraud or collusion, the bond having been given voluntarily several months after the Defendant had entered into the composition with his creditors.

Wilde Serjt. who shewed cause, urged that after consenting to accept the composition which the other creditors had agreed to receive in discharge of their debts, *Mary Juler* was guilty of a fraud on them in requiring any security for the residue; and he cited *Baile v. Rhodes* (a), and *ex parte Sadler* (b), to shew that a creditor who agrees to a composition with his debtor, is not permitted to sue for the whole of his demand. The plea was framed according to the principle laid down in *Hall v. Montague*. (c) If the bond were part of a contrivance to enable *Mary Juler* to receive more than the other creditors, it could not be supported.

Cur. edo. vult.

(a) 2 Esp. 236.

(b) 15 Ves. 52.

(c) 2 M. & S. 377.

BART C. J. The plea amounts to this, and no more, That the Defendant, being unable to pay his creditors in full, they, on the 24th December 1818, had agreed to take 6s. 8d. in the pound, and to release him from the payment of the remainder of their debts: that *Mary Juler*, for whom the Plaintiffs are trustees, was a party to this agreement, and that, in pursuance of this agreement, divers of the Defendant's creditors did receive a composition of so much in the pound, and did by deed release the Defendant from all claim to the remainder of their respective debts: that *Mary Juler* had notice of this: that nearly two years after this agreement, namely, on the 11th October 1820, the bond on which the action was brought, was obtained from the Defendant in fraud of the other creditors. The plea precludes the Defendant from going into general evidence of fraud, for it states in what the fraud and covin consists, namely, the Plaintiff's, at *Mary Juler's* request, taking this bond for the residue of her debt, after allowing for the amount of the composition, without the knowledge and consent, and in fraud of the other creditors.

It will be observed, that it is not stated that *Mary Juler* was ever paid her composition, or that all the creditors were paid their composition, and that *all* of them released. The language of the plea is, that *divers* of the creditors took the composition and released. Proof that two out of an hundred creditors had been paid their composition, and had released the Defendant, would support this allegation. The bond was not given till nearly two years after the agreement for the composition. The plea does not state that the bond was thought of, much less agreed for before or at the time of the composition.

If *Mary Juler* was not paid her composition, and only some of the body of creditors got their composition and

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released, it could not be contended that her debt was discharged by an agreement not performed by those who contracted with her: in such a case there would be no consideration for her giving up what was originally due to her. If she was paid her composition, and all the other creditors were paid their compositions, then, according to the cases of *Butler v. Rhodes* and *Brady v. Shiel* (a), the Defendant was relieved from the remainder of his debts, and was become as to all his creditors a free man. He could not have been sued upon the original contracts, but if he chose voluntarily to give a bond, even at the pressing solicitation of *Mary Juler*, there is no principle, no authority to protect him against a suit on a bond so given. The giving a bond under such circumstances is no fraud on the other creditors. If the Defendant became rich, and *Mary Juler* poor, as might be the case in the course of two years, what is there in law or morality to prevent him from paying her what she had lost by him; or, if he had not the money immediately at hand, giving her a security to pay it at a more convenient time. A bond given under such circumstances is a voluntary bond, and binding on the obligor, upon the same principle that a bond given by a bankrupt after he has fairly obtained his certificate, is binding on such bankrupt: as it was not given or agreed to be given at the time of the composition, it is no fraud on the other creditors.

Mary Juler accepted the composition upon the same terms as the other creditors; she had then no reason to expect that she should be paid any more than her composition. It is the pretending to accept the same terms as the other creditors, and so encouraging them to come into the arrangement, when the party so pretending *has at the time* secured to himself some advantage, of which

(a) 1 Campb. 146.

the others are not to partake, which constitutes the fraud on the other creditors. There is no deceit of this sort in the present case.

In *Cockshot v. Bennet* (a), the note on which the action was brought, was given before the deed of composition was signed by the Plaintiff, and for the express purpose of inducing him to sign the deed. In *Butler v. Rhodes*, and *Brady v. Shiel*, no new promise was made. The parties rested their claims on the original liability of the Defendants, which was discharged by the composition. In *Ex parte Sadler*, the notes on which the petitioners desired to prove a debt, were obtained by them before they would execute the deed of composition. The Lord Chancellor puts the fraud on the other creditors on the same principle that I have laid down in this case; his Lordship says, "If it is competent to six out of seven creditors to obtain other securities for the same amount, the seventh is imposed upon, as instead of having the evidence of the other six, that the act which he is about to do is reasonable, proved by the same act on their part, he is circumvented by their obtaining from their debtor an advantage which they will not give him as against themselves." In page 58. he says, "this advantage is obtained at the same instant when they are desiring the other creditors to take the security of the debtor alone."

The rule for entering a judgment for the Plaintiff, notwithstanding the verdict found for the Defendant on this plea, must be

Absolute.

(a) 2 T. R. 763.

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May 28.

CORMACK v. BAIN, a Prisoner.

Insolvent ;
discharge.

THE Defendant not being able to find the Plaintiff's place of abode caused Plaintiff's attorney to be served with notice of his intention to be brought up in this court, to be discharged under the act for the relief of insolvent debtors. The Plaintiff's attorney at the same time refused to disclose the Plaintiff's residence.

These facts having been stated in the Defendant's agent's affidavit of service of the above notice, which affidavit was filed two days previously to the insolvent's being brought up, and the Plaintiff's attorney having deposed nothing in the way of answer,

The Court refused to permit him, in lieu of the Plaintiff, to give the usual undertaking for allowing the insolvent his sixpences, and the insolvent was discharged. (a)

(a) A note for the payment of the sixpences was prepared by the attorney, but was held defective for not stating the day of the week on which they would be paid.

May 28.

BROWNE v. POWELL.

Where cattle
distrained da-
mage feasant
were in a pri-
vate pound,
and the dis-

REPLEVIN for sheep. Avowry: sheep damage feasant in avowant's close.

Plea in bar, among others, tender of amends before impounding, and issue thereon.

trainor admitted they were about to be forwarded to a public pound: Held, that a tender of amends made while they were in the private pound was not too late.

At

At the trial before *Basanquet* Serjt., last *Hereford* assizes, the evidence as to the tender was as follows. The sheep having been distrained by the avowant, and having been placed in an outhouse at *Ditton*, about 200 yards from the place where they were taken, the Plaintiff's son applied to the avowant's wife for the sheep; no one else being on the premises. The Plaintiff's son had done business before with the avowant's wife on the subject of impounding the same sheep, and she had been to the avowant's house when the avowant had distrained Plaintiff's stock. Upon being asked what amends she required, she said 23s. if they did not impound the sheep, and 35s. if they took them to the public pound at *Leominster*.

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The Plaintiff's son then made a tender, which was refused as insufficient.

On the part of the avowant it was contended, that the taking the sheep to the outhouse was an impounding, and that the tender came too late. But the learned Serjt. being of a contrary opinion, a verdict was found for the Plaintiff, on the issue of tender, and the jury were discharged on the other issues.

Wilde Serjt. moved for a rule nisi to set aside the verdict; which, having been granted,

The Court, without hearing the other side, now called on him to support; when he argued,

First, that the tender came too late, the sheep being already impounded; and he cited *Gen. Dig. Distress* (D), *Co. Lit.* 47 b. *Fitz. N. B.* 106, to shew that any place of confinement might be employed as a pound at the option of the distrainer, even on the spot where the cattle were distrained.

Next he contended, that there was no sufficient proof that the wife was the authorized agent of her husband;

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v.

POWELL.

that at the utmost she could, under the circumstances of the case, only be considered as a servant, and that a tender of amends to a servant or bailiff was insufficient, such a person not being able to judge of the amount of damages. *Pilkington's case.* (a)

BEST C. J. Two objections have been made to the verdict in this case; that the tender which has been proved was not made to the proper person, and not till after the sheep were impounded. The first objection is answered by the evidence, which shews clearly that this woman was the agent of her husband, and had acted for him upon similar occasions before, when her authority was acknowledged; she retained the authority therefore till it was countermanded. I agree to the position in *Pilkington's case*, that the servant distraining is not always the person to whom tender of amends can be made; for I may authorize a person to distrain whom I could not trust to receive the amends. But there is in this case abundant evidence to shew that the wife was authorized to receive.

The next question is, whether the cattle were legally impounded before the tender of amends was made. Upon this part of the case, the wife's declarations which accompany the act she was authorized to do, may properly be taken into account; and if so, the cattle, at the time of the tender, were clearly destined for the pound at *Leominster*. Even if this had been otherwise, it is by no means clear that the confinement in which the sheep were at first placed would have been a sufficient pound to make a tender of amends too late. It is not necessary now to decide that point, but it seems that the pound of the lord of the manor is the only pound for

(a) 5 Rep. 76. a. Gro. Eliz. 813.

such a purpose; if it were otherwise, the distrainer, by impounding on the spot where he takes the cattle, or very near, might exclude the possibility of any tender of amends being made. The pound, therefore, which will exclude such a tender, must be a pound in which the cattle are no longer in the custody of the party; and I am confirmed in this by the language in *Pilkington's* case, where it was resolved by the whole Court, that a tender is too late after the cattle are in *the custody of the law*. But in the present case the agent of the distrainer admits that the cattle were destined for another pound; and, therefore, the rule to set aside the verdict must be discharged.

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BURROUGH J. There is ample evidence to shew that the wife was the agent of the husband; and with respect to the pound, a public pound differs in many respects from a private one. In the private pound the distrainer is bound to find fodder for the cattle distrained, in the public, not; a tender, therefore, may well be excluded in one case and not excluded in the other. If the wife was agent to her husband, the tender in this case was valid.

CASELEE J. The evidence as to the agency of the wife is not contradicted on the other side; and it also appears, that the ultimate destination of the sheep was the pound at *Leominster*. It seems consonant with good sense, that with reference to the time of a tender, a distinction should be made between the custody of the party and the custody of the law. If the custody of the party were sufficient to exclude a tender, no tender could ever be made; but, according to the old maxim, a reasonable time for making the tender ought always to be allowed. However, it is not necessary to decide the point upon the present occasion, because, according to the

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the evidence, the sheep were clearly on their way to an ulterior destination.

Rule discharged. (a)

(a) *Park J.* was absent.

May 28.

NEWTON v. COWIE and Another.

In order to sustain an action for pirating prints, the proprietor's name and the date of publication must appear on the original print, pursuant to 8 G. 2. c. 13, but it is not necessary that the designation *proprietor* should be added to the name. •

THIS was an action on the case, for the alleged piracy of nine engravings published at different periods in a monthly publication of the Plaintiff's, called "The London Journal of Arts and Sciences;" eight of which engravings purported to be representations of patent inventions, and one of a locomotive steam carriage, not the subject of a patent.

At the trial at *Gulldhall*, at the adjourned sittings after *Hilary* term, before *Gaselee J.*, the Plaintiff confined his case to four only of the engravings: viz. "Murray's Locomotive Steam Engine," (first count;) "Yardley's Glue Apparatus," (second;) "Goodman's improved Loom," (seventh;) and "Wright's Washing and Bleaching Apparatus," (ninth;) and it was objected by Defendant's counsel that the Plaintiff could not recover, inasmuch as he had not complied with the conditions of the acts of parliament, by engraving the date of the publication with the name of the proprietor on each of the prints; for, with respect to *Yardley's* glue apparatus and *Goodman's* loom, there was not any date on either of the prints, but only *Newton del.* at one corner, and *Bellin sculp.* at the other: the other two had, in like manner, the Plaintiff's name in one corner as the delineator, and the name of *Gladwin* as engraver in the other

other corner, and also the date, but no designation of *Newton* as proprietor. It was also objected by Defendant's counsel, that with reference to the prints of the three patent drawings, (which, it appeared, had been engraved by the Plaintiff's apprentice on a reduced scale,) the Plaintiff could not have any copyright in them, it being proved in evidence that they were merely copies of the enrolled drawings at the patent office, on a reduced scale.

The learned Judge directed the jury to find for the Plaintiff, liberty being reserved for the Defendants to move to set aside the verdict and enter a nonsuit; and they accordingly found a verdict for the Plaintiff on the first, second, seventh, and ninth counts of the declaration, and for the Defendants on the others.

By the 8 G. 2. c. 13. "Every person who shall invent and design, engrave, etch, or work in *mexxotinto*, or *chiaro oscuro*, or from his own works and invention shall cause to be designed and engraved, etched or worked in *mexxotinto* or *chiaro oscuro*, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof; which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints."

The statute then prescribes certain penalties against persons who shall copy any such prints, and limits the period for bringing actions to three months.

The 7 G. 3. c. 38. extends the provisions of the former act to "any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever," giving also a copyright for twenty-eight years instead of fourteen, and extending the time for the commencement of actions to six months.

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By the statute of 17 G. 3. c. 57. it is enacted, that if any persons shall, within the times limited by the aforesaid acts or either of them, "engrave, etch, or work, or cause or procure to be engraved, etched, or worked in *mezzotinto*, or *chiaro oscuro* or otherwise, or in any other manner copy in the whole or in part, by varying, adding to, or diminishing from the main design, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, which hath or have been, or shall be, engraved, etched, drawn, or designed in any part of *Great Britain*, without the express consent of the proprietor or proprietors thereof;" the proprietor shall, by a special action on the case, recover damages against the person so offending with double costs of suit.

Wilde Serjt., upon the objections urged at the trial, moved for a rule to set the verdict aside. The statutes having given a monopoly, it is essential to the title of the party who claims the monopoly, that he comply with all the conditions attached to it. For the protection of the public, it is most material that the day of publication of the print should appear, otherwise it is impossible for a rival publisher to know whether he offends or not. In *Sayer v. Dacey* (a) it was held, that both conditions of the act must be complied with, in order that any person may know when the proprietor's exclusive right ceases, and when and against whom he may be guilty of offending. In *Thompson v. Symonds* (b), *Sayer v. Dacey* was confirmed, and *Kenyon C.J.* and *Buller J.* held, that the name and date should both appear on the print, both being required in the same section; and *M^r Murdo v.*

(a) 3 *Wils.* 60.(b) 5 *T. R.* 45.

Smith (a) (a decision on the 34 G. 3. c. 23., for the protection of the proprietors of new patterns in printed calico, the words of which statute are the same as those in 8 G. 2.), is in effect an authority to the same point. It is true, that in *Blackwell v. Harper* (b), Lord *Hardwicke* seemed to think that the statute was only directory, and that the mention of the date on the print was not necessary; but in *Harrison v. Hogg* (c), Lord *Abanley* said he inclined to differ from Lord *Hardwicke*, as he must believe the name and date to be essential to the author's right. In *Beckford v. Hood* (d) and *Roworth v. Wilks* (e), it was held that the author of a book might sue to recover damages for a piracy, although his book were not entered at Stationers' Hall. But the 8 Ann. c. 19., which gives the author of a book the copyright, vests the right by one section, and requires the entry at Stationers' Hall by another; whereas the 8 G. 2., which gives the proprietorship in prints, requires the insertion of the date and name in the same section which gives the right; and in *West v. Francis* (f), *Abbott C. J.* ruled, that the whole of a section in 17 G. 3. c. 57. must be taken as one sentence. Besides, *Beckford* sued not on the statute, but on the common law right, and it was admitted, that if he had proceeded for the penalties given by the statute, he must have proved the entry at Stationers' Hall.

If then it be necessary that the print should shew the name of the proprietor as well as the date of publication, it is equally necessary within the spirit of the act, that he should be designated as proprietor; otherwise, as was observed in *Sayer v. Dacey*, another publisher would have no means of knowing against whom he was offending. On each of the four prints in respect of which

(a) 7 T. R. 518.

(b) 2 Atk. 93.

(c) 2 Ves. jun. 323.

(d) 7 T. R. 620.

(e) 1 Campb. N. P. C. 97.

(f) 5 B. & A. 741.

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this action has been brought, there are two names, one described as delineator, the other as sculptor; but which of them, if either, is proprietor? that, the print no where discloses. In *Blackwell v. Harper*, only one name appeared on the print, so that no mistake could arise; but in the present instance, it is impossible to say whether the sculptor or delineator, — if either, — or both, be proprietors.

At all events the Plaintiff is not entitled to a verdict on the engravings of the patent drawings, such drawings being public property, and open to be copied by all the world. The mere reduction of a drawing to a size proper for a book will not confer a copyright: if it would, a person who had engraved a valuable drawing upon a large scale, might be defrauded of the benefit of his skill and labour by any one who chose to copy it on a small scale. In *Wyatt v. Barnard* (a) it was held that no copyright could exist in specifications, although acquired from the patent office with some labour and expence.

Spentis Serjt. contra. Upon the engravings described in the second and seventh counts, the date sufficiently appears in the circumstance that they form part of a periodical work, the title page of which must necessarily indicate the day of publication; but the provisions of the statute with respect to name and date are merely formal and directory, and not essential to the Plaintiff's title. *Blackwell v. Harper* was decided shortly after the passing of the statute of 8 G. 2., and as a contemporaneous exposition is entitled to great weight. In *Harrison v. Hogg*, Lord *Alvanly* said it was not necessary to decide the question; and in *M'Murdo v. Smith*, which is a case on a different act, there was only an expression of opinion; the

(a) 3 Ves. & B. 77.

point was not adjudicated. So that there is no case which has expressly laid down that the appearance of the name and date on the print are essential ingredients in the Plaintiff's title. The principle laid down in *Beckford v. Hood* and in *Roworth v. Wilks* ought, therefore, to govern this case; for there can be no distinction between a property in books and a property in prints; and if in an action for pirating a book it be not necessary for the Plaintiff to have given public notice of his title by an entry at *Stationers' Hall*, neither ought rigid formalities to be required with respect to prints. At all events the Plaintiff is entitled to a verdict on the first and ninth counts in respect of the prints which exhibit both his name and the date of publication; for the acts have nowhere required that, in addition to the name of the proprietor, the print should exhibit also the word *proprietor*. As to the objection, that the Plaintiff has copied a specification in which he has no property; the answer is, he seeks no property in the specification; but he has a property in the copy of the specification, which, if he reduces and executes in a style of his own, he makes, to some extent, original; as if one were to make an engraving of a statue, or of tapestry, or of a picture gallery. The act expressly recognizes a property in a copy of such kind, for it specifies engravings taken from plans, &c. The Defendant may doubtless copy the same specification, but he must not copy the Plaintiff's engraving of it.

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Wilde was heard in reply.

Cur. adv. vult.

Barr C. J. This was an action on the case for pirating prints: a verdict was found for the Plaintiff on the first, second, seventh, and ninth counts, with 1s. damages on each.

Objections

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Objections were made to the Plaintiff's recovering on these counts, and the consideration of these objections was reserved by Mr. Justice Gaselee, who tried the cause.

The objection to the verdict on the first and ninth counts is, that the name of the proprietor does not appear on the prints.

The words on these prints are, "*Newton del. 1st May 1826. Gladwin sculp.*" The words of the statute of 8 G. 2. c. 13., which gives a monopoly to the proprietors of prints, prescribe that the day of the first publishing "shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." The words on these prints do not directly designate that the Plaintiff is the proprietor, nor do I believe that it has ever been stated on any print that was ever published who was the proprietor. Nor in any one of the cases which have been decided in favor of engravers, has the word proprietor ever appeared upon the print.

In *Blackwell v. Harper*, which was decided shortly after the passing of the act, the designer's and engraver's names only, were on the print in the same form as here. It has been the uniform practice so to print the names of the proprietors, and it would destroy much valuable property in prints to hold that this is not sufficient.

The words of the act are satisfied by the disclosure of the proprietor's name; this is a sufficient indication of the person who is to be applied to for leave to copy the print; coupled with the date, it shews how long the designer has had the monopoly, and fully accomplishes the two objects of the act.

The same objection was raised in *Blackwell v. Harper*, but it was treated as of no importance by Lord Hardwicke. The silence of *Westminster Hall* on the point in all

all the subsequent cases, coupled with the uniform practice of engravers, satisfies us that we are warranted in putting the same construction on the act.

The objection which applies to the second and seventh counts is, that the prints to which these counts relate have not the date of their publication. I will first consider this in the authorities which are to be found.

If these are consistent we are bound by them, even although our own minds do not approve the principles on which they rest. There would otherwise be no certain rule which could be known to those who are required to conform to the law.

If the decisions are contradictory, we are to consider the reasons given for them by those who pronounced them.

If our predecessors have given no reasons for their judgment, or the reasons given for conflicting judgments are equally unsatisfactory, we are to put that construction on the statutes which our own unfettered judgment induces us to think the legislature intended should be put on them.

The first case is *Blackwell v. Harper*, 2 *Atkins*, 92., better reported in 1 *Barnardiston*, 210. In that case the time was not mentioned when the plaintiff first published. The Chancellor was of opinion, "that the words of the act requiring the insertion of the dates were directory *only*, and not *descriptive*, and, therefore, the day is only necessary to be inserted on prints where *the penalty of the act is intended to be taken advantage of.*" But in *Barnardiston* this important passage is added: "That as the circumstance of inserting the day was not complied with, he would grant an injunction to restrain the defendant from publishing the prints for the future, *but would not direct an account* of the profits of those already published." And then, at the close of his judgment, he is represented to say, "it is matter of

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doubt whether the clause ought to be construed directory or descriptive."

If his Lordship was right that the plaintiff was not entitled to an account for by-gone profits, why is this Plaintiff entitled to recover damages for a by-gone injury? The authority, therefore, is rather in favour of the objection than against it. The Chancellor, indeed, seems influenced by the decision of *Ballard v. Walker*, which, as cited in *Blackwell v. Harper*, and it is not to be found elsewhere, was a decision on the 8 *Ann. c. 19.*, and related to a book which had not been entered at *Stationers' Hall*. But the words of that act are different from those of the acts relating to prints.

The words of the statute of *Ann* are, "that nothing in this act shall be construed to subject any bookseller to forfeitures by reason of the printing any book, unless the title of the copy shall be registered with the *Stationers' Company*." Consequently, no forfeitures could be incurred unless where a proper entry had been made at *Stationers' Hall*. But in the 8 *G. 2.* the same clause which gives the proprietor the monopoly, requires him to engrave on his plate the date of publication.

The next case is *Harrison v. Hogg*, where Lord *Alvanly* (one of the safest guides in *Westminster Hall*) says, "I am glad I am relieved from determining on that act; for at present I am inclined to differ from Lord *Hardwicke*. I must believe that it is essential to the Plaintiff's right to insert the date; many good reasons require that the date should be on the plate."

The third case, *Thompson v. Symonds*, was an action on the case on the 17 *G. 3.* This point does not appear to have been made at the trial, nor was it the point decided; but *Buller J.* says, "When the legislature give the monopoly, they require that the date and name of the person entitled to the monopoly should appear; both of which are required in the same section."

M'Murdo

M^r Murdo v. Smith was an action on the case for pirating a pattern for printing calico, contrary to 34 G.3. c. 23., the words of which are substantially the same as in the first of these acts. Upon a motion in arrest of judgment, Lord *Kenyon* said, "I am clearly of opinion that it was necessary for the plaintiffs, who undertook to prove an invasion of their right during the existence of the monopoly, to prove that they had *printed the date on their cloth*, otherwise they could not have obtained a verdict." Judgment, indeed, was given for the Plaintiff in that case, because enough was proved at *Nisi Prius* to entitle the plaintiff to recover, and the objection did not arise on the record; but in the present instance the objection has been made, and the proof has failed at *Nisi Prius*.

Beckford v. Hood was an action on the case for pirating a book: the work was not entered at *Stationers' Hall*, and the question was, whether an action on the case could be maintained for the injury to the plaintiff's right, or whether he must sue for the penalties given by the statute? That was the only question that Lord *Kenyon* and the other Judges appear to have considered. Lord *Kenyon* said the entry at *Stationers' Hall* was to be a warning not to incur penalties. The decision, however, was on a different statute; and calling on another not to injure rights is a different thing from suing for forfeitures.

The only remaining case is that of *Roworth v. Wilks*, in which Lord *Ellenborough* did not fully decide, but reserved the point for the opinion of the Court. The case, however, was never brought before the Court.

The reporters of these conflicting decisions have not given us the reasons which induced the different Judges to give such contradictory judgments.

I have no scales by which to ascertain the comparative weight of the authority of men all equally

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eminent. We must, therefore, go back to the fountain head — the statutes.

The decision of the House of Lords, although on the statute of *Ann* respecting copyright, has established a principle that precludes the right of a common-law monopoly on engravings since the statutes of 8 G. 2. c. 7. and 17 G. 3.

The 8 G. 2. enacts, that “ every person who shall invent and design, engrave, etch, or work in *mezzotinto* or *chiaro oscuro*, or from his own works and invention, shall cause to be designed and engraved, etched, or worked in *mezzotinto* or *chiaro oscuro* any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof; which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints.” If I stopped here, I should say that the publication of the date of the print was essential to the monopoly, but by a subsequent section the penalty is only given against the copiers of *such* prints, that is, those with the name of the proprietor and the date of publication; and all the cases agree that the penalties at least cannot be recovered unless these conditions are complied with.

The 7 G. 3. extends the protection afforded by 8 G. 2. to those who engrave or cause to be engraved any print taken from any picture, drawing, model, or sculpture, as if such prints had been graved or drawn from the original design of such person.

The 17 G. 3. c. 57. gives the remedy of an action on the case.

Neither of the two last acts repeat the qualifications of name and date, and the last has, after enumerating different sorts of prints, the words “ *any print or prints whatsoever.*”

But

But these acts are *in pari materia*, and must be taken together, and it was not necessary to repeat in the last the qualifications contained in the first.

The right of action given in 17 G. 3. is for the piracy of plates, the monopoly of which is secured by the 8 G. 2.

It is impossible to suppose the legislature intended that the public should not have the protection afforded them by the first act against a fraudulent continuance of the monopoly beyond the term prescribed by that act.

There is another objection to the verdict on the ninth count, viz. that the print to which it relates was engraved from a drawing of a machine on the specification of a patent; and that the specification being accessible to the public, a person who engraves a plate from a drawing taken from the specification is not entitled to a monopoly under the statutes relative to engravings.

The drawing in this case was made by an apprentice of the Plaintiff, from which the plate was engraved that the Defendant had copied.

It has been insisted that neither the Plaintiff nor the person employed by him was either the *inventor* or *designer* of this engraving.

It should be observed, however, that the scale was reduced from the drawing on the specification of the patent. Such reduction requires *labour and some degree of skill* to preserve the proportions. This the Defendant in copying the engraving has the advantage of, while the making this engraving requires all the invention and design which is expected from an engraver.

An engraver is always a copyist, and if engravings from drawings were not to be deemed within the intention of the legislature, these acts would afford no protection to that most useful body of men, the engravers. The engraver, although a copyist, produces the resem-

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blance by means very different from those employed by the painter or draftsman from whom he copies;—means, which require great labour and talent. The engraver produces his effects by the management of light and shade, or, as the term of his art expresses it, the *chiaro oscuro*. The due degrees of light and shade are produced by different lines and dots; he who is the engraver must decide on the choice of the different lines or dots for himself, and on his choice depends the success of his print. If he copies from another engraving, he may see how the person who engraved that, has produced the desired effect, and so without skill or attention become a successful rival.

The first engraver does not claim the monopoly of *the use of the picture* from which the engraving is made; he says, take the trouble of going to the picture yourself, but do not avail yourself of my labour, who have been to the picture, and have executed the engraving.

Without the introduction of express words, I should have thought, therefore, that a case of this kind fell within the spirit of the act. But the 7 G. 3. c. 38. extends the protection of the first statute to any print of any “map, chart, or plan, or any other print or prints whatsoever.” The same words are used in 17 G. 3. c. 57., and nothing is said as to the place in which the original is to be found. Looking, therefore, at the subject matter of the law, at the language employed by the legislature, and the practice which has uniformly been followed by engravers, we cannot hesitate to determine that the proprietors of these prints are entitled to the protection which is afforded by the statutes; a decision we have come to with satisfaction, seeing that they exercise a branch of art eminently useful, and which in no slight degree *emollit mores, nec sinit esse feros*. They contribute also by the same means to the circulation of a knowledge of mechanics, so necessary to our manufactures

factures and so useful to the best interests of the country.

The verdict must be entered for the Plaintiff on the first and ninth counts, and for the Defendant on the others.

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Judgment for the Plaintiff accordingly.

RULES OF COURT.

In the matter of the Fleet Prison, IT IS ORDERED, that from and after the last day of this term, the Warden do cause the gates of the said prison to be closed at the hour of ten of the clock at night until *Michaelmas*, and at the hour of nine of the clock at night between *Michaelmas* and *Lady-day*, and at the said hour of ten from *Lady-day* to *Michaelmas* in future, and that no person be admitted into the said prison during the last hour preceding that at which the gates are so to be closed, unless it be a new prisoner or in case of an emergency under the sanction of the warden or his deputy.

W. D. BEST.

J. PARK.

J. BURROUGH.

S. GASELEE.

WHEREAS it has been suggested to us, that inconvenience may in some cases arise, if the rule of this Court, made in *Hilary* term last, respecting the taking the acknowledgments of persons levying fines or suffering recoveries before commissioners be continued in its present extent ;

AND

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AND WHEREAS it appears to us upon consideration of the matters so suggested, that it will be more convenient to revoke the said rule, and make another in lieu thereof, IT IS THEREFORE ORDERED by the Court, that from and after the first day of the next term, the said rule shall be and the same is hereby revoked :

AND IT IS HEREBY FURTHER ORDERED, that from and after the said first day of the next term, when the acknowledgments of any person or persons levying fines or suffering recoveries shall be taken before commissioners, one at least of the commissioners for the taking the acknowledgment of any party to such fine or recovery, shall be a person who is not concerned as the attorney, solicitor or agent, or clerk to the attorney, solicitor or agent of any party thereto, and that in the affidavit to be made of the due taking of such acknowledgment, it shall be deposed, in addition to the facts now required by the rules of the Court to be included in such affidavit, that one (at least) of the commissioners taking such acknowledgment is not the attorney, solicitor or agent, or clerk to the attorney, solicitor or agent of any of the parties to the fine or recovery for the taking the acknowledgment to which the commission, under which he has acted, has been issued, and the name and residence of such commissioner shall be stated in such affidavit.

IT IS FURTHER ORDERED, that from and after the first day of next term, the commissioners do enquire of married women whether they intend to give up their interests in the estates to be passed by any fine or recovery, without having any provision made for them in return for or in consequence of their so giving up such interests; and if it appears to such commissioners that any provision is to be made on any such married woman, they shall not take her acknowledgment until they are satisfied that such provision has been made; and one of the

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the commissioners taking the acknowledgment of such married woman shall state in the affidavit to be made of the due taking such acknowledgment, that such enquiry was made, and also the answer given thereto, and where any such provision has been agreed to be made, that he the said commissioner is satisfied that the same has been made; and where such married woman, in answer to such enquiry, shall declare that she intends to give up her interest without any provision, that he the said commissioner has no reason to doubt the truth of such declaration, and verily believes the same to be true.

AND IT IS HEREBY FURTHER ORDERED, that from and after the first day of the next term the affidavit of the due taking of any acknowledgment to any fine or recovery shall be in the form hereunto annexed, with such variations only as the circumstances of the case shall render necessary, and that the party or parties making the same do pursue the exact words of such form, and do not, unless absolutely necessary, substitute others which he or they may think synonymous thereto.

And lastly, to avoid the delay and expence occasioned by any variance in the names of any of the parties making such acknowledgments between their signature thereto and the *precipe* prefixed to such acknowledgment, or the *dedimus potestatem* under which the same is taken, IT IS ORDERED, that the commissioners, before they sign their names to the caption of such acknowledgment, do take care that the signatures of the parties correspond with the *precipe* and *dedimus*, and that if any of the names are not correctly stated in the *dedimus*, they forbear to take the acknowledgment until the writ shall have been amended by the proper officer.

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knew the same to be a fine [*or*, that the said warrant of attorney was intended for the suffering a common recovery] to pass his, her, and their estate and estates. And this deponent further saith, that he, this deponent, [*or*, the said *J. K.*, as the case may be, adding if not the commissioner making the affidavit, “whose place of residence is at”] is not concerned

as the attorney, solicitor, or agent, or clerk to the attorney, solicitor or agent, of any or either of the parties to the said fine [*or*, recovery]. And this deponent further saith, that in pursuance of the order made by this honourable Court in *Easter* term, in the eighth year of the reign of His Majesty King *George* the Fourth, respecting the acknowledgment of fines and recoveries, the said commissioners did enquire of the said *E.* [*or*, if, more than one, of each of them the said *E. &c.*], whether she intended to give up her interest in the estates to be passed by such fine (or recovery) without having any provision made for her in return, for or in consequence of her so giving up her interest in such estates; and that in answer to such inquiry, the said *E.* declared that she did intend to give up her interest in the said estates without having any provision made for her in return, for or in consequence of her so giving up her interest, which declaration of the said

this deponent has no reason to doubt the truth of, and verily believes the same to be true [*or*, declared that a provision was to be made for her in return, for or in consequence of her giving up her interest in the said estates, and this deponent, before her acknowledgment was so taken, was satisfied and does now verily believe that such provision has been made.

If there are any rasures or interlineations in the acknowledgment or warrant of attorney, the affidavit to state that they were made before the parties signed the

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same. And, if in the caption, that they were made before the caption was signed by the commissioners.

Where the whole of the facts cannot be spoken to by one deponent, the necessary alterations must be made to enable more than one deponent to state their respective parts of it.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

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IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

In the Eighth Year of the Reign of GEORGE IV.

YOUNG v. GROTE and Others.

June 18.

AN arbitrator, to whom disputes between the above parties had been referred, found by his award that *George Grote the elder, William Willoughby Prescott, George Grote the younger, and William George Prescott,* were entitled to retain the sum of three hundred and

A customer of a banker delivered to his wife certain printed checks signed by himself, but with blanks

for the sums, requesting his wife to fill the blanks up according to the exigency of his business. She caused one to be filled up with the words, *fifty pounds two shillings*, the *fifty* being commenced with a small letter, and placed in the middle of a line: — the figures *£ 50. 2s.* were also placed at a considerable distance from the printed *£*: — in this state she delivered the check to her husband's clerk to receive the amount; whereupon he inserted at the beginning of the line in which the word *fifty* was written, the words *three hundred and*, and the figure 3 between the *£* and the 50.

The bankers having paid the 350*l.* 2*s.*: Held, that the loss must fall on the customer.

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fifty pounds two shillings and threepence, the only disputed item in an account referred to in the submission, and that *Peter Young* had no legal claim or demand whatsoever against them in respect of that item; but stated upon the face of his award the following facts, in order to enable *Peter Young* to take the opinion of the Court of Common Pleas, whether, under the circumstances, he ought to bear the loss of that sum.

Before, and in the year 1826, *George Grote* the elder, *W. W. Prescott*, *G. Grote* the younger, and *W. G. Prescott* carried on business in *London*, as bankers, under the firm of *Grote and Company*.

Peter Young, before and in the year 1826, kept cash with, and was in the habit of drawing upon *Grote and Co.* drafts or orders for sums of money on paper, issued by the latter, containing printed forms of drafts, having in one line the names of the bankers, in the second line the words "*pay ——— or bearer,*" and at the bottom of the draft the letter "*£;*" a sufficient space being left between the second line and the bottom of the draft for a third line.

On the 12th *August* 1826, *P. Young*, having occasion to quit his home upon business, by which he was likely to be detained for several days, signed with his name five of these printed checks, without inserting in them any dates or sums of money, and he left the same in the possession of his wife, and desired her, in his absence, to have them filled up for such sums as the purposes of his business might require. On the 19th *August* *Mrs. Young*, in order to pay the wages of different persons employed by her husband, required the sum of fifty pounds two shillings and threepence, and she delivered one of the checks so signed by *P. Young* to *William Worcester*, a clerk of *P. Young*, and desired *W. Worcester* to fill it up with the sum of fifty pounds two shillings and three-pence. *Worcester* accordingly

accordingly filled it up with that sum, and shewed it so filled up to Mrs. *Young*, and she desired him to get it cashed, but the check, when it was so filled up and shewn to Mrs. *Young*, presented the following appearance: the first line contained in print the names of the bankers; the second line contained the words *Pay wages* or *bearer*, the word *wages* only being in writing, and the third line contained the words *fifty pounds* and the figures 2s. 3d.; but the word *fifty* commenced in the middle of that third line, and with a small letter, so that ample space in that line was left for the insertion of other words before the word *fifty*: and there was at the bottom of the draft the figures 50. 2. 3., but the figure 5. was at a sufficient distance from the letter £ to allow another figure to be inserted between it and the letter £. After *Worcester* had shewn the draft to Mrs. *Young* in this state, he, without any authority from her or from *Peter Young*, altered the sum mentioned in the draft to three hundred and fifty pounds two shillings and three-pence, by inserting in the third line of the draft, before the word *fifty* the words *three hundred and*, and by introducing at the bottom of the draft, between the letter £ and the figure 5. the figure 3.; and this alteration was made in such a manner that no person, using due and ordinary diligence, could have discovered that it had been made improperly after the draft had been once filled up for another sum, and signed by the drawer. The check so altered was presented by *Worcester* to *Grote* and Co., and they paid to him, in pursuance of the order contained in it, and which purported to be that of *P. Young*, three hundred and fifty pounds two shillings and three-pence; and in an account delivered by them to *P. Young*, they debited him with that sum. He objected to that debit, alleging that his draft was only for fifty pounds two shillings and three-pence. The arbitrator thought

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that it was his draft for that sum only, but he thought, also, that he had been guilty of gross negligence, by causing his draft to be delivered to *Worcester* (in whose hand-writing the body of it had been filled up) in such a state that the latter could and did, by the mere insertion of other words, make it appear to be the draft of *Peter Young* for the larger sum; and that as he, partly by his negligence, had caused the bankers to pay the larger sum, he was bound to make good to them the loss, which, by reason of his negligence, they had sustained by paying that sum. If the Court of Common Pleas should think that opinion wrong, then he awarded that *Peter Young* was entitled to receive from *Grote and Co.* the sum of three hundred pounds, and ordered accordingly.

Whereupon a rule was obtained by *Wilde Serjt.*, calling upon *Grote and Co.* to shew cause why they should not pay *Young* 300*l.* *Wilde* cited *Hall v. Fuller* (a), where a check, which was drawn by a customer upon his banker for a sum of money described in the body of the check, having afterwards been altered by the holder, who substituted a larger sum for that mentioned in the check, but in such a manner that no person, in the ordinary course of business, could observe it, and the banker paid the larger sum, the Court held, that he could not charge the customer for any thing beyond the sum for which the check originally was drawn.

Taddy Serjt. shewed cause. *Young* acted with negligence in leaving a blank check to be filled up by his agent; and his agent acted with greater negligence in permitting the sums to be written on the check in such a position as to admit of the insertion of other words without exciting suspicion. *Grote and Co.* on the other hand, acted in the ordinary way of business,

(a) 5 B. & C. 750.

for they could not refuse to cash a check signed by their customer. In such a case the loss must fall on the customer. The very question had been considered by *Potier* (a); who said,—after distinguishing between payments made *ex causâ mandati*, and *ex occasione mandati*, and holding, contrary to *Scacchia*, that in general the banker ought to be responsible where he pays, in consequence of a fraud practised by the holder, — “Cependant, si c’était *par la faute du tireur* que le banquier eut été induit en erreur, la tireur n’ayant pas eu le soin d’écrire sa lettre de manière à prévenir les falsifications; puta, s’il avait écrit en chiffres la somme tirée par la lettre, et qu’on eut ajouté zero, le tireur serait en ce cas tenu d’indemniser le banquier de ce qu’il a souffert de la falsification de la lettre, à laquelle le tireur par sa faute a donné lieu; et c’est à ce cas qu’on doit restreindre la décision de *Scacchia*.”

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Hall v. Fuller is clearly distinguishable. In that case *Hall* had given a check to his friend properly filled up for three pounds: his friend handed it over to another, who, by a chemical process, expunged the original sum and inserted a larger. But *Hall* having by his mode of signing and drawing the check given no opening to the fraud, the consequences of it fell, in the usual course, upon the banker *Fuller*, who, being deceived, paid a large sum without authority. In like manner, in *Smith v. Mercer* (b) the drawer had done nothing incorrect; and the bankers were held responsible for not knowing his hand-writing. In the present case, *Young* himself, or his agent, the wife, was the cause of the banker's being misled; *Young*, therefore, ought to bear the loss.

Wilde. It is the constant practice of merchants to

(a) *Traité du Contrat du Change*, p. 1. c. 4. s. 99.

(b) 6 *Taunt.* 76.

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have checks signed in blank: they could not carry on business without doing so. *Young's* authority terminated when his wife assented to filling up the check with 50*l.* 2*s.* What was written afterwards was a forgery, for the consequences of which the bankers were liable in the usual way. There was no negligence in *Young*, for his agent saw the smaller sum duly written upon the check, and both she and *Young* acted *bonâ fide*. *Hall v. Fuller* is in point; for it can make no difference whether the forgery be effected by interpolation or by expunging.

BEST C. J. Although I entertain no doubt on the subject, this is a case of considerable importance, and the question has been properly raised by the arbitrator. Undoubtedly, a banker who pays a forged check, is in general bound to pay the amount again to his customer, because, in the first instance, he pays without authority. On this principle the two cases which have been cited were decided, because it is the duty of the banker to be acquainted with his customer's hand-writing, and the banker, not the customer, must suffer if a payment be made without authority.

But though that rule be perfectly well established, yet if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again. That principle has been well illustrated by *Potier*, in commenting on the case put by *Scacchia*. "Cependant, si c'était *par la faute du tireur* que le banquier eut été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications; puta, s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eut ajouté zero, le tireur serait en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur par sa faute a donné lieu; et c'est à ce cas qu'on doit restreindre la décision de *Scacchia*."

In

In the present case, was it not the fault of *Young* that *Grote* and Co. paid 350*l.* instead of 50*l.*? *Young* leaves a blank check in the care of his wife. It is urged, indeed, that the business of merchants requires them to sign checks in blank, and leave them to be filled up by agents. If that be so, the person selected for the care of such a check ought at least to be a person conversant with business as well as trustworthy. But it was not likely that the drawer's wife should be acquainted with business, and she acting as her husband's agent, ought not to have trusted to receive the contents of the check, any person with whose character she was not perfectly acquainted. If *Young*, instead of leaving the check with a female, had left it with a man of business, he would have guarded against fraud in the mode of filling it up; he would have placed the word fifty at the beginning of the second line; and would have commenced it with a capital letter, so that it could not have had the appearance of following properly after a preceding word: he would also have placed the figure 5 so near to the printed £. as to prevent the possibility of interpolation. It was by the neglect of these ordinary precautions that *Grote* and Co. were induced to pay. The case of *Smith v. Mercer* bears no resemblance to the present; but *Chambre J.* grounded his judgment on the same principle as that on which we now proceed. In *Hall v. Fuller*, the check was properly drawn by the plaintiff in the first instance; the words which he had written were expunged, and supplied by others in a different handwriting, and the alteration was made, not by the plaintiff's clerk, or a person improperly trusted by him, but by an entire stranger, who accidentally became possessed of the check. If the banker had been discharged in that case, there could be none in which he would be liable. We decide here on the ground that the banker

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has been misled by want of proper caution on the part of his customer.

PARK J. I am of the same opinion. *Hall v. Fuller* is clearly distinguishable from the present case; and though the Lord Chief Justice is reported to have expressed himself somewhat generally, his expressions must be taken to have reference to the facts of the case. But *Bayley J.* puts the case on the principle on which I coincide with the Lord Chief Justice here. "The banker, as the depositary of the customer's money, is bound to pay from time to time such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer." Can any one say that the check signed by *Young* is not a genuine order? I say it is. The checks left by him to be filled up by his wife, when filled up by her, become his genuine orders. However the arbitrator finds expressly that he was guilty of negligence; and I concur in that opinion. He leaves blank checks in the hands of his wife, who was ignorant of business, but having left them with her to be filled up as the exigency of the moment might require, they become, upon her issuing them, his genuine orders.

BURROUGH J. The arbitrator attaches no blame to the bankers, and it is manifest that the legal blame attaches to their customer. First, he leaves a blank check with his wife as agent for him, and she then causes it to be filled up in an unusual way;—at least a line might have been drawn to fill up the interval before the word *fifty*. The blame is all on one side.

GASELEE J. The arbitrator has not found that the clerk was in the habit of filling up checks for his employer, or of going to the bankers to receive money on his

his account. Those circumstances might have strengthened the case; but there certainly was great negligence on the part of *Young*, and therefore the rule must be
Discharged.

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ORPWOOD v. BARKES.

June 18.

CASE for slander. The declaration alleged, that the Plaintiff, a livery stable-keeper, had bought corn of *Bovill*, which was to be paid for at a future day; that Defendant thereupon said to *Bovill*, "'Ware hawk! you must take care of yourself there; mind what you are about:" meaning that Plaintiff was in indigent circumstances, and incapable of paying his just debts. Whereupon his neighbours suspected such to have been the case, and refused to deal with him, and *Bovill* refused to deliver the corn unless Plaintiff would pay the price before delivery, which he was thereupon obliged to do before the time stipulated in the contract.

The second count stated, that, in consequence of this conversation, *Bovill* refused to deliver any more corn on credit, by means of which premises Plaintiff had been greatly injured.

At the trial before *Gaselee J.*, *Middlesex* sittings after last term, it appeared that the Plaintiff, a stable-keeper, and the Defendant, resided in the same neighbourhood; that the Defendant had evinced enmity towards the Plaintiff, and had threatened "to do for him." *Bovill*, who supplied the Plaintiff with corn, &c. being on his way to the house of the Plaintiff, to obtain payment for part of his account, met the Defendant, and informed him whither he was going, when the Defendant said, "'Ware hawk

The Plaintiff declared that the Defendant slandered him by saying of him to a person about to supply him with goods, "'Ware hawk; you must take care of yourself there; mind what you are about:" Held, that the action lay, though the Plaintiff did not prove the latter part of the sentence, "You must take care of yourself there."

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hawk there; mind what you are about." Whereupon *Bovill* refused to furnish any more corn till he was paid for what he had already sold. It appeared that the Plaintiff's business had been nearly destroyed. It was also clearly proved that the Defendant applied the words to the Plaintiff; and in *malo sensu*; for he boasted that he should take care Plaintiff should get neither hay nor oats, and that he would drive him out of the yard. The jury gave a verdict for Plaintiff, with 150*l.* damages, which

Wilde Serjt. now moved to set aside, on the ground of a variance, and the amount of the damages, no special damage having been alleged or proved. He stated the rule of pleading to be, that where the words alleged in the declaration formed one continuous sentence, — one connected assertion, — the whole of them must be proved as laid; though where they composed several sentences, and constituted distinct assertions, it might be sufficient to prove any one assertion. That the whole sting of the supposed slander lay in the words which the Plaintiff had failed to prove; for the words "'Ware hawk; mind what you are about," had no application to the Plaintiff without the addition of the words, "you must take care of yourself there."

Then as to damage; none had been proved. It was no reasonable ground of complaint that the corn-dealer should refuse to furnish more oats till those he had furnished before were paid for; and no special damage resulting from the words had been alleged or proved.

BEST C. J. I do not agree to the rule or principle, as contended for by my brother *Wilde*, nor have I ever heard that because a sentence is continuous, as stated in the declaration, in an action of slander, the whole of it must be proved. As I understand the rule, it is not
 necessary

necessary to prove all the words laid in the declaration, provided enough be proved to sustain an action for slander. And enough has been proved in the present case. " 'Ware hawk," under the circumstances in which it was spoken, is equivalent to " Beware of a sharper;" and by the expression, " mind what you are about," the Defendant clearly intended to injure the Plaintiff's credit. If the words, " take care of yourself," had been necessary to render the rest intelligible, undoubtedly they ought to have been proved, but I am of opinion they were by no means necessary. The others were distinctly actionable without them.

As to the damages, sufficient have been proved from the Defendant's own admissions to render it improper for us to interfere with the verdict.

PARK J. I am of opinion there is no variance in this case. It is not necessary in an action of slander for a Plaintiff to prove all the words laid in his declaration, although, if he were to leave out any that qualified the rest, the omission would certainly be fatal; as if a man were to say, " You are a thief; *for* you stole a woman's heart;" the latter words, as explaining the meaning of the charge, could not be omitted. But in the present case, the meaning of the words proved is not at all varied by the omission of certain others, which are alleged in the declaration.

As to the damages, there is no ground for interfering.

BURROUGH J. The rule, as to the necessity of proving the whole of a continuous sentence, only applies where the words omitted in proof would materially alter the sense. In *Buller's Nisi Prius*, it is said (a), " It was formerly holden that the plaintiff must prove

(a) P. 5.

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the words precisely as laid ; but that strictness is now laid aside, and it is sufficient for the plaintiff to prove the substance of them." The words omitted here contained no qualification of the charge ; and whether they were uttered or not, makes no difference in the case. As to the damages, they were not too high ; for the Plaintiff, from his situation in life, suffered more from the Defendant's slander than a richer man would have done.

GASELEE J. If the words omitted in proof had altered the sense, there might have been some reason for a further inquiry ; but they make no difference at all. There is no reason for interfering with the damages, when the Defendant, from his own admissions, was so avowedly actuated by ill will, and the Plaintiff suffered so much in his business.

Rule refused.

June 19.

BAMPTON v. PAULIN.

An auctioneer employed to sell goods on certain premises for which rent was in arrear, was applied to by the landlord for the rent, the landlord saying, it was better to apply so than to distrain ; the auctioneer answered, " You shall be paid ; my clerk shall bring you the money : " Held, that an action lay on this promise without a note in writing.

THE Plaintiff declared that one *Donaldson* and one *Smith* held certain premises of his, as tenants, and owed him 5*l.* 2*s.* for rent ; that the Defendant had been employed by *Donaldson* and *Smith* to sell certain goods on the premises ; that the Plaintiff was minded to seize these goods as a distress for the rent ; and that in consideration he would forbear to do so, the Defendant promised to pay the amount of the rent. Breach, non-payment. Plea, general issue.

At

At the trial before *Gaselee J.*, *Middlesex* sittings after last term, it appeared that the Defendant, an auctioneer, was employed by *Donaldson* and *Smith* to sell certain goods on the premises; that the Plaintiff's agent applied to him for rent due to the Plaintiff, saying, "It was much better so to apply, than to put in a distress, and stop the sale;" when the Defendant, after inquiring the amount, said, "Madam, you shall be paid; my clerk shall bring you the money."

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A lease executed twenty-four years ago, which Plaintiff had to give in evidence, was attested by two witnesses: one of them was proved to be dead: with regard to the other, the Plaintiff proved that he had enquired at two places in *London* where she had formerly lived, and could not hear any thing about her. The learned Judge left it to the jury to say, whether, under those circumstances, sufficient enquiry had been made.

A verdict having been found for the Plaintiff,

Taddy Serjt. now moved for a rule *nisi* to set it aside. He argued, that the Defendant's promise ought to have been in writing to bind him; and he endeavoured to distinguish this case from *Williams v. Leper* (a), (where the defendant's promise was given on the plaintiff's withdrawing a distress for rent,) on the ground that here no distress had been made or threatened; besides, the authority of *Williams v. Leper* had been doubted. [*Park J.* In *Castling v. Aubert* (b), all the Court refer to it as clear authority.] *Taddy* then insisted that sufficient search had not been made for the surviving attesting witness. But

The Court thought otherwise, that question having been left to the jury; and being clearly of opinion that this case was not distinguishable in substance from *Williams v. Leper*, the rule was

Refused.

(a) 3 *Burr.* 1886.

(b) 2 *East*, 324.

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June 19.

DOE dem. FLEMING v. FLEMING.

Reputation is good evidence of marriage, though the party adducing it as evidence seeks to recover as heir at law, and his parents are still living.

THE lessor of the Plaintiff claimed the premises sought to be recovered in this ejectment as heir at law to his brother, the person last seised.

His father was still alive, and the only evidence of the lessor of the Plaintiff's having been born in lawful wedlock was the reputation of his parents having lived together as husband and wife.

A verdict having been found for the Plaintiff at the trial before Best C. J., *Middlesex* sittings after last term,

Wilde Serjt., moved for a new trial, on the ground that though reputation was evidence of marriage in ordinary cases, yet where the Plaintiff was to recover as heir at law, where his being such was the sole question to be tried, and his father was still alive, direct evidence of the marriage ought to have been furnished.

PARK J. The general rule is, that reputation is sufficient evidence of marriage, and a party who seeks to impugn a principle so well established, ought, at least, to furnish cases in support of his position; as we have heard none, I see no reason for disturbing the verdict.

BEST C. J. The rule has never been doubted. It appeared on the trial that the mother of the lessor of the Plaintiff was received into society as a respectable woman, and under such circumstances improper conduct ought not to be presumed.

Rule refused.

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BETTS, Executor, v. APPLGARTH.

June 20.

THE Defendant having obtained orders for time under terms of pleading issuably, pleaded accordingly to an action on a bill of exchange, and the money counts, the general issue, except as to 500*l.*, parcel of the sums claimed; and as to the 500*l.*, that Defendant had accepted a bill to that amount in favour of Plaintiff's testator.

The Plaintiff replied, and delivered the issue with notice of trial.

The issue was returned by the Defendant's attorney, with the notice of trial struck out, and a demurrer to the replication instead, assigning as cause, that the replication professed to answer the whole of the plea, and yet only took issue on so much of the Defendant's plea, whereof he had put himself upon the country, and did not confess or avoid so much of the plea as related to the sum of 500*l.*, parcel of the sums in the declaration mentioned, and also was in other respects uncertain, informal, and insufficient.

The Plaintiff thereupon signed judgment, and gave notice of the execution of a writ of enquiry. This judgment was set aside by an order of a judge at chambers for irregularity, on the ground that the terms of pleading issuably did not apply to any proceeding subsequent to the plea.

Wilde Serjt. moved to set aside this order. This demurrer was not an issuable plea within the terms of the Defendant's rule for time. *Cuming v. Sharland (a)*,

(a) 1 *East*, 411.*Wagstaffe*

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Wagstaffe v. Long (a), Foster v. Snow (b), Berry v. Anderson (c), Blick v. Dymoke. (d) In *Sawtell v. Gillard (e)*, which is expressly in point, the Court refused to set aside a judgment signed under circumstances such as the present, upon a demurrer to a replication.

Cross Serjt. contrd. The condition of pleading issuably applies only to the stage of the proceedings in which it is imposed, and does not affect subsequent proceedings; otherwise there would be no check on irregularity in those subsequent proceedings.

This principle, which was distinctly acknowledged in *Berry v. Anderson*, was not brought to the attention of the Court in *Sawtell v. Gillard*. In the other cases cited, the demurrer was put in in the same stage of the proceedings in which time had been given on terms of pleading issuably.

Wilde was heard in support of his rule.

BEST C. J. If we had known in the first instance that this was a demurrer to the replication, we should not have granted the rule. The order for time under terms of pleading issuably must apply to the existing state of the cause at the time it is issued, and does not extend to cover subsequent errors. If it did, parties might go on blundering to the end of the cause. In *Sawtell v. Gillard* the attention of the Court was not called to this distinction.

Rule discharged.

(a) *Barnes*, 263.

(b) 2 *Burr.* 782.

(c) 7 *T. R.* 530.

(d) 1 *Bingh.* 379.

(e) 5 *Dowd.* & *Ry.* 620.

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HANCOCK and Another v. HODGSON and Others.

June 22.

THE Plaintiffs declared in covenant on certain articles of agreement under seal between the Plaintiffs on the one part, and the Defendants, directors of the company or association thereafter mentioned, of the other part. The agreement as set out on oyer, after reciting among other things, that there was about to be formed a joint stock company, whereof the Defendants had been chosen to act as directors for and on behalf of themselves and other the members and shareholders of the company; and that as such directors they had agreed with the Plaintiffs to purchase their estate and interest in the *East Downs'* mine, in the manor of *Gooncarl in Cornwall*; proceeded as follows:

“ And whereas the said directors (the Defendants) do hereby agree with *E. Y. Hancock* and *R. Vazie* (the Plaintiffs) to purchase their estate and interest in the said mine, comprising both the copper and copper ore, tin and tin ore, and all other metals and minerals whatever, under or by virtue of the said in part recited indenture and agreement, but subject as hereinafter mentioned, at the price or sum of 4,500*l.*, to be paid and payable out of the monies to be raised by the said company at the times and in manner hereinafter mentioned; that is to say, the sum of 1000*l.* in part payment of the said purchase money, by the following instalments; the sum of 300*l.* at the time of executing these presents; the further sum of 200*l.* on or before the 22d day of *August* instant; and the further

By a deed which recited that Defendants, the directors of a mine company, had purchased a mine for 4,500*l.*, to be paid within a twelve-month out of the monies to be raised by the company, with a proviso that the directors should be allowed six months further time, in case the bankers of the company should not within the twelvemonth have received sufficient deposits from the subscribers to enable the directors to pay thereout; the directors covenanted that out of the payments so to be made by the subscribers, they would

pay the purchase money at the time specified, subject to the aforesaid

Held, that the directors were personally responsible at the expiration of the eighteen months.

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sum of 500*l.*, being the remainder of the above-mentioned 1000*l.*, on or before two months from the date hereof, being the 3d day of *October* next; and the balance of the said purchase money, that is to say, the sum of 3,500*l.*, within twelve months from the date of these presents by four quarterly and equal payments or instalments of 875*l.* each; the first instalment to be made on or before the 3d day of *December* next, being the period of two months from the intended completion of the payment of the deposit of 1000*l.* as aforesaid: provided always, and it is hereby expressly agreed by and between the several parties hereto, that in case there shall not have been received by the bankers of the said company, or by the directors for the time being, the deposits or instalments due from the several shareholders so as to enable the said directors to pay the balance due on account of the said purchase-money at the times hereinbefore mentioned, then and in such case the said directors shall be allowed, and are hereby allowed a further time to pay such balance until six months after the time or times when the said quarterly instalments become due:"

The covenant whereupon was, " And the said directors, parties hereto, do hereby promise and agree, that out of the said payments so to be made by the subscribers or shareholders in the said company, they will pay or cause to be paid unto the said *E. Y. Hancock* and *R. Vazie* the said purchase-money or sum of 4500*l.*, or so much thereof as shall remain due and payable, according to the terms and at the times before specified, subject nevertheless to the aforesaid provisoes and conditions."

Breach, non-payment according to the covenant.

The Defendants pleaded, among other matters,

1. That no money had been raised by the said company, or any payments made by the subscribers or shareholders, applicable to the payment of the said purchase-money, except

except to the amount of 1000*l.*, which 1000*l.* the Defendants paid, and the Plaintiffs received in satisfaction and discharge of the said sum of 300*l.*, 200*l.*, and 500*l.*, in the articles of agreement mentioned.

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2. That there had not been received by the bankers of the company, or by the directors for the time being, the deposits or instalments due from the several shareholders in the company, so as to enable the directors or the bankers to pay the balance of the purchase-money in the declaration mentioned.

3. That no payments had been made by the subscribers or shareholders in the company, so that the monies in the declaration alleged to be in arrear could be paid thereout.

To these pleas there was a general demurrer and joinder.

Wilde Serjt., who was to have argued in support of the demurrer, was stopped by the Court, when

Taddy Serjt. for the Defendants, contended, that upon this agreement they were not individually responsible as directors for debts incurred for the benefit of the whole company. By the language of the agreement it was expressly stipulated, that the money was to be paid out of the funds raised by the subscriptions of the shareholders. This, therefore, could not be binding on the directors personally: they had given no positive promise to pay, but only on condition that the money should be raised by the subscriptions of others. In cases of bills of exchange and promissory notes it had been held, that a party was not personally responsible for the payment of a bill drawn on particular funds: *Dawkes v. Delorane* (a), *Jenny v. Herle*. (b) In the present case there was no unconditional promise or agreement to pay, and it was im-

(a) 2 *Will.* 909.

(b) *Ld. Raym.* 1361.

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probable that any persons would render themselves personally responsible for a debt from which they had no probability of ever receiving any benefit.

BEST C. J. I think the directors are clearly liable on this deed. The cases which have been cited do not apply, having merely decided, that instruments ordering a sum to be paid out of a particular fund are not negotiable as bills of exchange or promissory notes; but, looking at the whole of this deed, which must be taken most unfavourably against the covenantors, there can be no doubt that the Defendants have rendered themselves personally liable. The deed states that 200*l.* is to be paid at the time of executing those presents; 300*l.* on 22d of *August*; 500*l.* in two months; and 3500*l.* at the end of twelve months: provided, that the directors shall be allowed six months further time, in case the instalments from the shareholders shall not have been received. The obvious meaning of this is, that the directors are to pay in twelve months, in case the subscriptions shall have been received in the interval, but that they shall pay in eighteen months at all events, whether subscriptions shall have been received or not. The advantage or disadvantage of such a contract to the directors is a question for them to consider, and not the Court.

PARK J. The cases cited only shew, that instruments made payable out of a particular fund are not negotiable, and do not apply to the case before the Court. I am clearly of opinion, that upon this agreement the Defendants are liable. It is stipulated, indeed, that the 4500*l.* is to be paid by instalments, and that the time of payment is to vary according to circumstances; but no intention is intimated to leave the Plaintiffs remediless in case of failure of any subscription fund;

fund; the object, on the contrary, of the six months further time must have been to enable the Defendants to pay out of their own pockets, in case of the subscriptions failing.

The rest of the Court concurring,

Judgment was given for the Plaintiffs.

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HANCOCK
v.
HODGSON.

ROLT, Assignee of WELSFORD, a Bankrupt, v.

June 22.

WATSON.

ASSUMPSIT for goods sold and delivered by *Welsford* before his bankruptcy to the Defendant. The action was commenced in *Hilary* term, 1827.

At the trial before *Best C. J.*, *London* sittings in *Easter* term last, the defence was, that on the 4th of *October* 1825, the Defendant accepted a bill at three months, drawn by *Welsford* for the amount of the goods.

Welsford proved that the bill had been lost, that he had never paid it away or indorsed it, nor had he offered to indemnify the Defendant upon receiving a new bill.

It appeared that the Defendant had never been called on to pay the bill; and the jury finding expressly that *Welsford* had never indorsed it, gave a verdict for 14l. 10s., the value of the goods. But leave was given to the Defendant to move to set it aside.

Bosanquet Serjt. moved for a rule *nisi* accordingly, on the ground that the Defendant having accepted a bill for the amount of the goods, which bill had never been dishonoured, was not liable to an action for the goods. If the bill were lost, the holder's course was prescribed by statute, to apply to the acceptor for a new bill, offering

Defendant had accepted a bill payable at three months for the amount of goods he had purchased:

The seller lost the bill, not having indorsed it, and became bankrupt:

No demand was ever made on the Defendant in respect of the bill:

Held, that the acceptance of this bill was no defence to an action for the value of the goods.

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 ROLT
 v.
 WATSON.

him an indemnity: 9 & 10 W. 3. c. 17. s. 3. No such indemnity having been offered, it must be presumed that the acceptor was still liable. In *Powell v. Roach* (a) the indorser was holden liable, though the bill was lost after it was due. In *Dangerfield v. Wilby* (b), Lord *Ellenborough* said it was incumbent on the plaintiff to shew that the bill was so lost that the defendant would be no longer liable. In *Mayor v. Johnson* (c), where half the note had been lost, Lord *Ellenborough* thought that the defendant ought not to be exposed to the risk of a demand in respect of the other half; and in *Poole v. Smith* (d) it was held, that the defendant ought not to incur responsibility where the note was lost. Although there are some decisions the other way, yet the more recent and weighty are all in favour of the defendant.

A rule *nisi* having been granted,

Wilde Serjt., who shewed cause, admitted, that if the Defendant were exposed to any liability in respect of this bill, his acceptance would be an answer to the action; but the bill not having been indorsed previously to the bankruptcy, and not having been presented, up to the time of the trial, a year and a half after the acceptance, no one could exhibit such a title in it as would affect the Defendant.

Bosanquet was heard in support of the rule.

BEST C. J. Under the stat. 9 & 10 W. 3. the holder of a lost bill of exchange could not in a court of law compel the acceptor to give him a new bill upon receiving an indemnity; for such a purpose he must resort to a court of equity. The question for us, therefore, is, Whether the bill which the Defendant in this cause has

(a) 6 Esp. 76.
 (b) 4 Esp. 159.

(c) 3 Campb. 326.
 (d) Holt, N.P.C. 144.

accepted,

accepted, be an instrument which can ever rise in judgment against him? Now the jury have found expressly that the bill was undorsed, and though payable three months after date, it has not been heard of from 1825 to 1827. There is no decision in which the party has been held to be responsible in respect of an outstanding bill undorsed. In all the cases in which a defendant has been holden to be discharged, in respect of a supposed liability on a bill, the bill has been in such a state as to be likely to be used against him: as in *Champion v. Terry* (a), where defendant paid for goods by a bill which he had indorsed in blank. The bill having been lost, it was holden he could not be sued for the value of the goods. The Defendant is not liable to be called on in the present case, and, therefore, this rule must be discharged.

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PARK J. I agree in the distinction that was taken in *Champion v. Terry*. In that case, the bill having been indorsed, the indorser was liable to be called on to pay it; in the present, the jury have found absolutely that it was not indorsed; and no demand having been made from 1825 to 1827, I think the Defendant cannot be held to incur any liability in respect of the bill.

BERROUGH J. The bill not having been indorsed cannot affect the Defendant, and he is, therefore, liable in respect of the original demand.

GASELNE J. As the Defendant cannot be called on in respect of this bill, I think the rule ought to be discharged.

Rule discharged.

(a) 3 B. 5 B. 295.

1897.

June 25.

Doe dem. BEDFORD and WHEELER v. WHITE.

Lessor, lessee, under-lessee : in a lease from lessee to under-lessee, it was provided, that if under-lessee were guilty of a breach of covenant, lessee and lessor might enter :

Held, that on breach of covenant in the lease to under-lessee, ejectment might be maintained by lessee alone.

EJECTMENT upon a forfeiture of a house demised by the lessors of the Plaintiff (who held under *Hawkins* the ground landlord) to *Hodgson Todd*, and by *Todd* assigned to Defendant's wife.

At the trial of the cause, *Middlesex* sittings in the present term, a verdict was taken for the Plaintiff, with liberty for Defendant to move to set it aside and enter a nonsuit, on the ground, among other objections, that the demises in the ejectment were wrong, because, in the lease upon which the ejectment was brought, the proviso for re-entry was copulative, connecting the ground landlord, *Hawkins*, with the lessors of the Plaintiff. This proviso was as follows: "Provided always, that if it shall happen that the yearly rent of 28*l.*, or any part thereof, shall be unpaid by the space of twenty-eight days next after either of the days whereon the same is hereinbefore reserved or made payable, or in case the said *Hodgson Todd*, his executors, administrators, and assigns shall not well and truly observe and perform all the covenants, provisoes, and agreements herein contained on his and their part and behalf, then and in either of the said cases, and thenceforth it shall be lawful for the said *Thomas Bedford* and *John Wheeler*, their executors, administrators or assigns, and for the said *John Sidney Hawkins*, his heirs and assigns, into and upon the said premises or any part thereof, in the name of the whole, wholly to re-enter," &c.

At the trial, *Taddy* Serjt. contended, that where an estate is to be defeated, the rule of law is, to construe the proviso rigidly; and that the power of re-entry contained

contained in the above proviso being given to the lessors of the Plaintiff, and *John Sidney Hawkins*, the ground landlord, and *Hawkins* being interested in the performance of the covenants, he ought to have been joined in the demise from *Bedford* and *Wheeler*.

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 DOE dem.
 BEDFORD
 v.
 WHITE

He now moved to enter a nonsuit upon the foregoing objection.

BEST C. J. The question is, Whether the right of entry reserved in the lease is a right of entry in the lessors of the Plaintiff, or in them and *Hawkins*? The construction of the lease, which is contended for on the part of the defendant, would leave the estate of the lessors of the Plaintiff entirely at the mercy of *Hawkins*; but, according to the language of this proviso, there is a separate right of entry for the lessors of the Plaintiff.

PARK J. The action is well brought on the demise of the two; it never was intended that this should be a joint right, and the form in which the proviso is drawn up is decisive of the question. We must read *and* as *or*.

BURROUGH J. The clause was manifestly drawn up with a view to the separate interest of *Hawkins*.

GASELEE J. *Hawkins* is no party to the deed in which the proviso is contained: but at any rate, where joint covenantees have separate interests, they may maintain separate actions. If it were otherwise, *Hawkins*, by refusing to enter, might render irreparable any loss occasioned to his own lessees.

Rule refused.

1827.

June 25.

ELVIN and Another v. DRUMMOND.

Plaintiffs declared on a writ of the king. The writ produced in evidence was in the name of George the Third, but tested in the name of Best Chief Justice, and indorsed with the date of 1826:

Held, no variance.

CASE against the sheriff of *Surrey* for an escape. The Plaintiffs declared, that having in *Easter* term, in the seventh year of the reign of our lord the now king, recovered in an action against one *Rowe*, they, on the 8th of *May* 1826, sued out of the Court of the Bench at *Westminster*, a certain writ of the king called a *ca. an.*, by which the king commanded the sheriff to take *Rowe*, if he should be found in his bailiwick, to satisfy the debt and damages recovered; which writ was duly indorsed, with a direction to the sheriff requiring him to levy 15*l.* 8*s.*, and was delivered to the Defendant, who then was sheriff of *Surrey*, to be executed. That the Defendant took *Rowe*, and permitted him to escape.

Second count for a false return of *non est invenius*.

Plea, general issue. At the trial before *Oastlow* Serjt. at the last *Surrey* assizes, the writ given in evidence was in the name of George the Third instead of George the Fourth. But it was tested Sir *W. D. Best*, Knight, at *Westminster*, the 8th of *May*, in the seventh year of our reign; and was indorsed, Levy, 15*l.* 8*s.* *Vincent, Clifford's Inn, May* 13th, 1826. The learned Serjt. thinking that the writ given in evidence did not answer the description of that set out in the declaration, the Plaintiffs were nonsuited, with liberty to move to set aside the nonsuit.

Cross Serjt. moved accordingly, and argued, that the writ being tested in the name of the present Chief Justice, and indorsed with the date of 1826, the writing of the addition *Third* instead of *Fourth* was an obvious clerical error,

error, and immaterial; that the numerical adjunct attached to the king's name formed no part of his title; that a misdescription of the great seal, styling it the seal of *Great Britain* instead of the seal of the United Kingdom, had been held immaterial, *Rex v. Bullock* (a); and that the Defendant having acted under the writ and made a return, was estopped to say that it was not a writ of the king.

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ELVIN
v.
DRUMMOND.

Wilde Serjt., contrà, urged that as the sheriff might have been sued for an irregularity in executing this writ, he ought not to be charged for not executing it; and he referred to *Scandover v. Warne* (b), where a declaration on a bail-bond having alleged that the Plaintiffs sued out a latitat against *Francis J.* by the name of *John J.*, it was holden in an action against the bail, that this allegation was not proved by the production of a writ against *John J.*, though he had signed the bond, "*Francis J.* arrested by the name of *John J.*"

But the Court were clear, that the writ being tested in the name of the present Chief Justice, and being indorsed with the date 1826, there was no material variance between the writ declared on and that produced in evidence; and, at all events, that the sheriff having acknowledged the writ by acting on it, could not now maintain such an objection.

Rule absolute.

(a) 1 Taunt. 21.

(b) 2 Campb. 270

1827.

• June 26.

PARKER and Another v. RAWLINGS.

The terms of a contract being as follows: "1st April 1826, sold *W. P.* one bale of sponge, at 10s. a pound, and bought of them yellow ochre at 5*l.* a ton, to be delivered on or before the 24th inst."

Held, that the delivery of the ochre by the 24th to the extent of the price of the sponge, was a condition precedent to the delivery of the sponge.

ASSUMPSIT. The Plaintiffs declared, that they, at the special instance and request of the Defendant, bargained with the Defendant to buy, and bought of him, and the Defendant sold to the Plaintiffs on the 6th of April 1826, a large quantity, to wit, one bale of *New Providence* sponge, weighing one hundred, three quarters, and twenty-one pounds gross, tare eight pounds, then lying in a certain warehouse of the Defendant, marked *P.*, at a certain rate or price agreed on between the Plaintiffs and Defendant, to wit, at the rate or price of ten shillings for each and every pound thereof; and the Plaintiffs bargained and sold to the Defendant, and the Defendant bought of the Plaintiffs a quantity of yellow ochre, equal to a certain sample thereof produced and shewn to the Defendant, marked *B.*, at and after the rate of five pounds per ton, to be delivered free alongside a certain wharf, called the *Red Lion Wharf*, on or before the 24th of April 1826: and in consideration thereof, and that the Plaintiffs at the special instance and request of the Defendant, had undertaken and faithfully promised the Defendant to accept and receive the sponge and to pay him for the same at the rate aforesaid, by delivering to him free alongside the *Red Lion Wharf*, within the time aforesaid, yellow ochre at the rate aforesaid, to such an amount and extent as would be equal in value to the sponge, and within the time aforesaid, the Defendant undertook and faithfully promised the Plaintiffs to deliver to them the said quantity of *New Providence* sponge within a reasonable time then next ensuing: that the Plaintiffs had always since the making of their said promise

mise and undertaking, been ready to accept the quantity of sponge, and to pay for the same in manner aforesaid: and that they were ready and willing to have delivered to him within the time aforesaid, free, alongside the said wharf, yellow ochre equal to the said sample, at the rate in that behalf aforesaid, to an amount equal to the price and amount of the said quantity of *New Providence* sponge, and had delivered to him yellow ochre to a large amount, to wit, the amount of eighty-seven pounds of lawful money, in part payment of and for the sponge.

Breach, non-delivery of the sponge. Plea, *non-assumpsit*.

At the trial before *Best C. J.*, *London* sittings in this term, the contract on which the Plaintiffs sued appeared to be as follows:

"Sold Messrs. *W. & S. B. Parker*, one bale of *New Providence* sponge, weighing one hundred three quarters and twenty-one pounds gross, tare eight pounds, lying in my warehouse, marked P., at ten shillings per pound: and bought of them yellow ochre equal to sample, at five pounds per ton; the sample, that which is marked B.: to be delivered free alongside of *Red Lion Wharf*, the empty packages to be returned, and the ochre to be delivered on or before the 24th instant.

"April 6. 1826."

"*Joseph Rawlings*."

Directed to Messrs. *W. & S. B. Parker*.

One of the Plaintiffs selected the sponge at the Defendant's warehouse, but afterwards suspecting they had made a bad bargain, and before they had delivered the whole of the ochre, they sent a friend to inspect the sponge. The Defendant did not afford him a sight of it. The Plaintiffs delivered ochre at various times

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times to the amount of 87%, but not to the full price of the sponge. In May 1826 they gave a friend an order to receive the sponge, but the Defendant refused to deliver it to him or to the Plaintiffs' carman, who was afterwards authorized to apply for it: he then, however, promised to send it, but failing in his promise, the Plaintiffs wrote to say they had been deprived of the only means of disposing of the sponge, and to decline taking it: no more ochre was delivered, but a demand was made for the payment of what had been already sent.

The action was commenced in *August* last.

The defence was, that the Plaintiffs had not delivered in payment for the sponge by the 24th of *April*, pursuant to their contract, the whole of the ochre necessary to make up the payment; and a verdict having been found for the Defendant,

Justice

and I

Taddy Serjt. moved for a new trial, on the ground that the agreement between these parties constituted two separate contracts; the fair construction of which was, that the Defendant was to deliver his sponge within a reasonable time, and the Plaintiffs their ochre by the 24th of *April*; and though the Defendant might have brought a cross action against the Plaintiffs for the non-delivery of the whole by that time, he could not set it up as a defence of the breach of his own contract to deliver sponge within a reasonable time. It was no part of the agreement that the sponge should be paid for by the ochre, or that the ochre should be delivered before the sponge.

Justice

The Court, however, were of opinion that this was a contract to pay for the sponge with ochre instead of money; that the delivery of the ochre by the 24th of *April*

1826

April was a condition precedent to the Plaintiffs having any claim for the sponge; and the condition not having been performed, the Plaintiffs were properly nonsuited.

Rule refused.

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PARKER
v.
RAWLINS.

EAST LONDON Water Works Company v. BAILEY and Others.

June 26.

THE Plaintiffs, a corporate body, sued the Defendants in assumpsit, on a contract entered into *February 25th, 1824*, for the delivery of a certain number of iron pipes; at stated periods, pursuant to certain proposals issued by the Plaintiffs, and accepted by the Defendants. The pipes were to be made according to a specification, containing minute details as to size, shape, and quality; were to be marked in various parts with the letters *E. L.* and were to be delivered, certain portions in *April, May, June, July, and August 1824*, and the residue by *Lady-day 1825*. The Defendants did not deliver the whole quantity contracted for, and this action was brought to recover damages for their failure to do so. The contract was not under seal.

The 47 G. 3. c. 72. s. 28. contains the following provision with respect to this company. "And the directors shall and may contract and agree with any body politic, corporate, collegiate, or any person or persons being owner or owners, occupier or occupiers thereof, interested therein, and willing to sell or let the same, for the purchase or rent of lands, tenements, or hereditaments that may be wanted for the purposes of the undertaking, and the works thereunto belonging, and shall and may, on behalf of the said company of proprietors,

An act of parliament empowered the directors of a water company to make "contracts, agreements, and bargains with the workmen, agents, undertakers, and other persons engaged in the undertaking."

Held, that an agreement for the fabrication and supply of pipes at certain stated periods, was not valid unless under seal.

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proprietors, settle, adjust, and determine all matters, questions, and differences which shall or may arise between the said company of proprietors and the several owners of and interested in any lands, tenements, or hereditaments which may be wanted, damaged, or affected by the execution of any of the powers hereby granted; and shall and may make contracts, agreements, and bargains with the workmen, agents, undertakers, and other persons employed or concerned in making, completing, or continuing the works belonging to the said undertaking, and all and every part or parts thereof: and the said directors shall (subject nevertheless to the orders and directions of general or special general assemblies) have full power and authority to direct and manage the affairs of the said company of proprietors; and the said directors shall, by themselves or the clerk to the said company of proprietors, keep a full and true account of all money disbursed and payments made by the said directors, and by all and every person and persons employed by or under them; and of all and every sum and sums of money which they shall receive on behalf or in respect of the said undertaking from any collector or collectors, or other officer or officers, or from any other person or persons whomsoever, employed in or having any concerns, dealings, or transactions with the said undertaking, or in or with any part or parts thereof; and shall regularly, by themselves or their clerk as aforesaid, write, insert, and enter in a book or books, to be from time to time provided at the expence of the said company of proprietors, for the purpose, minutes or copies (as the case shall require) of every such contract, bargain, receipt, and disbursement; and of all other their orders and proceedings, which book or books shall be deposited with and kept locked up under the care and direction of the said directors."

At

At the trial before Best C. J., London sittings after Hilary term, many objections, both in fact and law, were raised against the Plaintiffs' claim, and among the rest, that the Plaintiffs being a corporate body could not enter into a contract except under seal, and consequently could not sue in *assumpsit*: whereupon

A verdict was taken for the Plaintiffs, with leave for the Defendant to move to set it aside and enter a non-suit, upon this and other grounds.

Wilde Serjt. moved for a rule nisi accordingly, and many objections advanced by him were argued at great length, but the only point on which the Court delivered any opinion, was the capacity of the company to enter into a contract of this kind without a writing under seal. Against them it was argued, that there were only certain excepted cases in which a corporation could make or sue on a contract not under seal; and that this case did not fall within the exceptions, which were confined to executed contracts; *Mayor of Stafford v. Till* (a); to acts of daily occurrence and of little importance, as the payment of wages; &c. *Bro. Abr. Corp. pl. 56.*; or of immediate necessity; *Horn v. Ivy* (b); or to the drawing of bills or notes by a corporation instituted for the purpose, like the bank of England: that the 47 G. 3. c. 72. s. 28, which enabled the directors, in case of the company, to contract with persons engaged in the undertaking, did not authorize them to contract in any other than the usual manner, viz. under seal.

Taddy Serjt., *contrâ*, maintained that the manifest object of the act of parliament was to give facilities to the directors in managing the concerns of a trading

(a) 4 Bingham 75.

(b) 1 Vent. 47.

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company, and that that object would be entirely defeated by compelling them to have recourse to the formality of an instrument under seal for every bargain thus made in conducting the affairs of the company. He referred to *Lord Yarborough v. The Bank of England* (a), *Rex v. Bigg* (b), *Slark v. Highgate Archway Company* (c), and *Broughton v. Manchester Water Works Company* (d), to shew that there were many acts which a corporation might effectually do without a writing under seal, and more especially acts necessary for conducting any business in which they might be engaged, such as hiring servants, providing for the support of members, &c. That with a water company, the ordering of water pipes was a matter of daily and immediate necessity to the business of the company, and as such, within the exceptions specified in *Bro. Abr. Corporat. pl. 56.*, and *Horn v. Ivy*. Such orders were as much a part of the business of the company, as the drawing bills and notes was the business of the bank of *England*. It was only in transactions affecting real property that the formality of a seal was required.

BEST C. J. This was an action of *assumpsit* to recover damages for the non-delivery of certain iron pipes according to agreement. Several objections were made to the Plaintiffs' claim at the trial, and were reserved for the consideration of the Court. It is only necessary, however, for us to notice one of them, as that is fatal to the claim; namely, that this is an action of *assumpsit* against a corporation on an executory contract. If the Plaintiffs were not bound by this contract, neither were the Defendants, as no contract which is not mutual

(a) 16 *East*, 6.

(b) 3 *P. Wms.* 419.

(c) 5 *Taunt.* 792.

(d) 3 *B. & A.* 12.

can be valid. I had no difficulty on this point at the trial, but a doubt having been raised on the construction of the act constituting the corporation, it was reserved for the consideration of the Court. It is clear as a general rule, that a corporation cannot express its will except by writing under the common seal of the body corporate. It has indeed been contended at the bar, that this rule is confined to contracts affecting real property; but the rule is by no means so confined, although undoubtedly it is subject to some exceptions: these are to be found in *Bro. Abr.*, tit. *Corporation*, pl. 56., and the present case does not fall within any of them.

The first is, where the contract is executed; in that case the law implies a promise, and a deed under seal is not necessary, as we have lately decided in the *Mayor and Corporation of Stafford v. Till*, where it was holden that a corporation might maintain assumpsit for the use and occupation of their land.

The next exception is, where the acts done are of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal: all these are enumerated in *Bro. Abr.*, *Corporation*, 56., and in *Horn v. Ivy*.

Another exception is, where a corporation has a head, as a mayor, or a dean, who may give commands which a party may obey without the sanction of a common seal, *Randel v. Deane* (a), or may bind the corporation by record, *Vin. Abr.*, *Corpor.* K. 7. 21. A fourth exception is, where the acts to be done must be done immediately, and it would be impossible to wait for the formality of the corporation seal; as where cattle are to be distrained damage *feasant*, which might escape before the seal could be affixed. *Manby v. Long*. (b) But it is only in

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(a) 2 *Lut.* 1497.(b) 3 *Lev.* 107.

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cases of necessity, occasioned by the hurry of the proceeding, that such a course can be pursued; for in *Horn v. Jay* it is laid down that the appointment of the bailiff who is to make distrresses for the corporation must be under seal.

The same principle of necessity applies to corporations created for purposes of trade, such as the Bank of England. The very object of that institution requires that it should have the power of issuing bills of exchange and promissory notes. But this indulgence is not extended beyond cases of necessity; for in *Slark v. The Highgate Archway Company* the Court said, "That *assumpsit* on notes would not lie against a corporation, unless the act which authorized the making of the promissory notes *eo nomine*, by the corporation *ex vi termini*, impliedly empowered the corporation to make a promise." And in *Broughton v. The Manchester Waterworks Company*, which I should not cite, but that my judgment in the case has been confirmed by a decision in this court, I am reported, and correctly, to have said, "When a company, like the Bank of England or East India Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated, that they should have power to accept bills or issue promissory notes. It would be impossible for either of these companies to go on without accepting bills." This, therefore, being an action of *assumpsit* on an express executory contract where the party cannot recover on any legal implication, but only on the bargain as it actually exists, is an action which does not lie against a corporation, unless authorized by the act which constitutes the corporation. The contract not being binding on the corporation, there is no mutuality between the parties, and as the corporation cannot be sued,

sued, neither can it sue. Does the statute, then, contain any thing to alter, in this instance, the general law by which corporations are bound? The act creating this corporation, 47 G. 3. c. 72. s. 28., enacts "That the directors may make contracts, agreements, and bargains, with the workmen, agents, undertakers, and other persons employed in the said undertaking." This seems, at first sight, to give the directors authority to make a bargain such as the present; but in truth it is only intended to enable them to regulate the internal concerns of the company without the incumbrance of calling all the members of the company together. The directors may, indeed, of their own authority, make a bargain under the provisions of this clause in the act; but they must make such bargain in the usual way; the company must express their assent in the mode prescribed by law, by a writing under their common seal.

Upon the ground, therefore, that in this instance the Plaintiffs have sued on a contract, not under the common seal of the corporation, the rule for setting aside the verdict which has been obtained by them must be made

Absolute.

1827.
EAST LONDON
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June 30.

GULLY v. Bishop of EXETER.

An advowson in gross, passes in a will under the word *tene-ment*.

2. Where a deviser, after leaving several estates for life; *vs.* to his heir; directing that certain property should be sold to pay his debts; and other property, in case that first pointed out should be insufficient; then leaving *20l.* a year more to his wife to be charged on all that remained unsold; devised all the residue of his goods and chattels, lands, and tenements, charged as aforesaid, to his brother, if living, if not to his brother's children, with a proviso that *C. T.* and *E.* should have *200l.* more than the others;

Held, that a fee passed in the residue.

2. The declaration stated, that *J. S.* by deed conveyed the purparty of an advowson to *L. S.* By the deed *J. S.* had conveyed the whole, but it appeared that he possessed only a purparty:

Held, no variance.

QUARE IMPEDIT. The declaration, in tracing the Plaintiff's title, stated, among other things,

That *Robert Isaac* being seised of a purparty or fourth part of the advowson in question, by deed poll of 1672, in consideration of 20s. paid by *Lewes Stevings*; and for service done to him by *Lewes Stevings*, as also for divers other good and valuable causes and considerations him thereunto moving, granted the same purparty in the same advowson to *Lewes Stevings* and his heirs:

That afterwards *John Stevings*, who took under *Lewes*, devised the said purparty in the advowson to his brother *Richard*, if living, and if dead, to *Richard's* children, and their heirs as tenants in common; *Katherine*, *Thomasine*, *Susannah*, and *Jane*, being, at the time of the death of *John Stevings*, the only children of the said *Richard*.

At the trial before *Park J.*, *Exeter* Spring assizes, the deed from *Robert Isaac* to *Lewes Stevings* being produced, appeared, for the considerations therein stated, to convey the whole advowson from *Robert Isaac* to *Lewes Stevings*, but it appeared also that *Isaac* was entitled to no more than a fourth part.

John Stevings' will being produced, commenced as follows:

" As

"As for the worldly estate it has pleased God to give me, I dispose of the same as hereafter mentioned:" he then proceeded to give several estates to his wife expressly for her life; a dwelling-house to *Prudence Hawkes* expressly for her life; successive terms for years in the same house to the husband and son of *Prudence*, each of them paying testator's widow during her life 1s. *per annum*, and after her death 1s. *per annum* to testator's heir; then he directed certain property to be sold to pay his debts, and ordered that other property should not be sold unless necessary, expressing his belief that there would be enough to pay his debts without selling that other part. After his debts were paid he gave his wife an additional 20*l.* *per annum*, to be issuing out of the whole estate that should remain unsold; then followed the residuary clause: "all the rest and residue of my goods and chattels, lands and tenements, not before given and bequeathed, my debts being paid, I give and bequeath, subject and charged as aforesaid, to my brother *R. Stevings*, if living at the time of my death, if not living, to his children, to be divided between them; but my mind is, that *Catherine* shall have 200*l.*, *Thomasine* 300*l.*, and *Elizabeth* 200*l.* more than any of the rest."

It was objected that the deed from *Isaac* to *Lewes Stevings* was misdescribed in the declaration, inasmuch as it professed to convey the whole advowson, and not a purparty, and to have been made for several considerations, and not merely in consideration of 20*s.* This objection was overruled. But it being also objected that *John Stevings'* will did not convey a fee in the purparty of the advowson to *Richard Stevings'* children, or at all events that an advowson in gross would not pass under the word *tenement*, the Plaintiff was nonsuited, with liberty to move the Court for a new trial.

The declaration containing also an allegation that, in

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1699, *John Stevings* granted to *Henry Chichester* the next avoidance of the living in question by an indenture which was then delivered to *Henry Chichester*, but of which the Plaintiff made profert of the counterpart.

The Plaintiff at the trial called *F. Chichester*, the representative of *Henry Chichester*, who stated that he had placed all his title-deeds in the hands of an attorney at Bath, that the attorney sent them to *H. Phipps*, who was concerned for *Mascall*, of whom *S. Chichester* had borrowed money; and that *Mascall* said they were in the hands of *Phipps*; another witness proved a search at *Phipps's*; that he looked at all the deeds he had, but did not read them all through.

It was objected that a sufficient search had not been made for the original to entitle the Plaintiff to give the counterpart in evidence, but the objection was overruled, and the counterpart received.

Wilde Serjt., in *Easter* term last, moved for a rule nisi. In answer to the objection, that an advowson in gross would not pass under the word tenement, he cited *Co. Lit.* 85 a. 19 b., *2 Bl. Comm.* 17., *Com. Dig., Advowson*; *London v. Southwell* (a), *Perkins* 116; in all of which authorities the word tenement would embrace an advowson, and in this respect no distinction was made between an advowson in gross and an advowson appendant. Then, to shew that a fee passed to the children of *Richard Stevings*, he observed that the devisor, after having left several estates expressly for life, made no such limitation in the devise of the residue; and that he had charged his estates with the payment of debts, and with an annuity to his wife in such a way that nothing less than the devise of a fee could carry his intention into effect. Upon this point, *Frogmorton v. Holyday* (b), *Com.*

(a) *Hob.* 303.(b) 3 *Burr.* 1612.

Dig. Devisé, N. 4., and *Doe v. Snelling (a)* were referred to. A rule nisi having been granted,

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Bosanquet Serjt. shewed cause; he cited the Year-book, 36 H. 6. 35., as an authority that an advowson in gross does not lie in tenure; and 1 Roll. Abr. 816., title *Escheat*, to show that on the death of the grantee an advowson in gross does not escheat, and that, therefore, it does not lie in tenure, and he contended that the positions in *Perkins* 116., *Com. Dig., Advowson*, and *Hob. 309.* did not apply to advowsons in gross. In *Kensey v. Langhorn (b)*, it was holden that an advowson did not pass, though the devise was of lands, tenements, and hereditaments; and in *Westfaling v. Westfaling (c)*, Lord Hardwicke said, an advowson will not pass by the word lands, although it will by tenements and hereditaments; from whence it might be inferred that he thought it would not pass by the word *tenements* alone; and in *Hopewell v. Ackland (d)*, Trevor J. held that it would not pass under *tenements*.

Then, only an estate for life passed. Where a deviser charges his estate, a fee will often pass in order that the charge may be satisfied; but where he charges the person, it is otherwise: here, all the language of the will goes to shew that the person was charged, and not the estate.

Bosanquet then contended that the variances between the allegations in the declaration and the evidence adduced were fatal, referring to *Swallow v. Beaumont (e)*, *Edwards v. Lucas (f)*, and *Black v. Lord Braybrooke (g)*, and that the counterpart of the deed had been received without sufficient proof of search.

Wilde, in reply, argued that the deed was set out according to its legal effect, as it conveyed in fact no

(a) 5 East, 86.

(b) Cas. temp. Talb. 143.

(c) 3 Atk. 464.

(d) 1 Salk. 239.

(e) 2 B. & A. 765.

(f) 5 B. & C. 339.

(g) 2 Starkie, N. P. C. 7.

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more than the purparty, the grantor having no more to convey; and the only necessary consideration being the sum mentioned.

He was relieved from the objection as to the search; and as to the advowson in gross, observed, that no decision had been adduced to shew that such a property would not pass under the word tenement. In *Viner* the authorities in favour of that position were numerous, and there were only two contra. In *Westfaling v. Westfaling*, Lord *Hardwicke's* expression must be taken to mean that such an advowson would pass under tenements as well as hereditaments. Lord *Talbot's* decision turned on a devise for charitable purposes, in aid of which it was not possible to sell a turn to a void benefice. The dictum in *Hopewell v. Ackland* was altogether extrajudicial.

As to a fee passing by the devise, he insisted that under this will the estate was charged with the various incumbrances, and not the person, and that, therefore, a fee passed, and in addition to the former authorities referred to *Andrew v. Southouse* (a), *Smith v. Tyndal* (b), and *Carpenter v. Chapman*. (c)

BEST C. J. This was an action of *quare impedit*. In deducing the Plaintiff's title, the declaration stated that *John Stevings*, amongst other things, devised and bequeathed the purparty or fourth part of an advowson to his brother *Richard Stevings*, if he should be living at the time of the testator's death; and if he the said *R. Stevings* should not be living at the time of the testator's death, then to his children and their *heirs as tenants in common*.

To prove this allegation the will was read, in which, after these introductory words, "as for the worldly estate

(a) 5 T. R. 292.

(b) 2 Salk. 685.

(c) 9 Mod. 92.

it has pleased God to give me, I dispose of the same as hereinafter mentioned," *John Stevings* proceeds to give several estates to his wife expressly for her life; a dwelling house to *Prudence Hawkes* for her life; successive terms for years in the same house after her death to the husband and son of *Prudence*, each of these paying testator's widow during her life 1*s. per annum*, and after her death, 1*s. per annum* to testator's heir: then he directs property to be sold to pay his debts, and orders that other property shall not be sold unless necessary, and expresses his belief that there will be enough to pay his debts without selling the parts so reserved: after his debts are paid he gives his wife an additional 20*l. per annum* to be issuing out of the whole estate that shall remain unsold:

Then he proceeds: "All the residue of my goods, chattels, lands, and tenements, not before given and bequeathed, my debts being paid, I give and bequeath, subject and charged as aforesaid, to my brother *R. Stevings*, if living at the time of my death, if not living, to his children, to be divided between them; but my mind is, that *Catharine* shall have 200*l.*, *Thomasine* 300*l.*, and *Elizabeth* 200*l.* more than any of the rest."

At the trial it was objected, first, that an advowson in gross does not pass under the word *tenements*; secondly, that there are no words of limitation, and that therefore these parties did not take to them and their heirs, as stated in the declaration, but an estate for life only. Upon this objection the Plaintiff was nonsuited, and a motion has now been made to set the nonsuit aside.

As to the first point, it is admitted that an advowson appendant to a manor lies in tenure, and therefore would pass under the word *tenement*. But neither Lord *Coke* nor *Blackstone* make any distinction between advowsons in gross and advowsons appendant; and if one lies in tenure, so must the other. In *Co. Lit.* 85 *a.* we find the following

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following passage: "If an advowson be *holden* by knight's service." In 2 *Black.* 16. "tenement signifies every thing that may be holden;" and in page 17. "so is an advowson a *tenement*." But if an advowson in gross cannot lie in tenure, neither can an advowson appendant.

It may be urged that there can be no services for an advowson, and that nothing can lie in tenure unless there can be services for it; that it is the manor only that is a tenement, and not the advowson appendant to it.

But Lord Coke carries the import of the word tenement beyond things that lie in tenure.

Co. Lit. &c. "Tenement is a large word to pass not only inheritances which are holden, but offices, rents, commons, and the like, wherein a man hath any frank tenement, and whereof he is seised *ut de libero tenemento*."

If *tenementum* in an act of parliament includes advowsons, it certainly will pass them in a will in which a testator shews that he did not mean to leave any of his property undisposed of. Now, no man can doubt that advowsons may be entailed. From the beginning to the end of the stat. *de donis*, 13 Ed. 1. c. 1., in which the legislature proposed to fetter all the property of the country, there is no other word but *tenementum*. We should therefore unsettle estates if we held that an advowson was not a tenement. Lord Coke, in his first *Inst.* (19 b.), commenting upon the word *tenementum*, says, "This is the only word which the said stat. of Westminster 2nd., that created estates tail, useth; and it includeth not only all corporeal inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to, or exerciseable within the same, though they lie not in tenure, as rents, estovers, commons, or other profits granted out of land or offices or dignities which concern land

land or certain places." An advowson concerns land, and a certain place.

The old cases are all collected in *Viner's Abr.* tit. *Tenure* (B). From most of these, though some are conflicting, it appears that advowsons in gross, as well as appendant, lie in tenure.

The modern cases on the subject are few, but in *Westfaling v. Westfaling*, Lord Hardwick says, "An advowson will not pass by the word lands, although it will by tenements and hereditaments."

The obvious meaning of this is that it will pass either by tenements or hereditaments; for it does not require both. In *Kensley v. Langhorn*, indeed, it appears by a note in Mr. Griffith's edition that the words of the will were, "lands, tenements, and hereditaments." But the Judges of the King's Bench, and the Chancellor following them, must have been of opinion that the advowsons did not pass, only because what was given to the trustees was given to raise money, and none could be raised from a void church.

As to the objection that a fee did not pass in the purparty, it is clear from the introductory words of the will, from the testator's giving other estates expressly for life, from the charges on them, from the giving the 1s. to his heir out of one of his estates, from there being no devise over, and from the terms of the residuary clause, that the testator meant to give his missas the fee.

The words of the will in *Penwarden v. Gilbert* (a), which this Court held passed a fee, were not so strong as these in this will. I agree with the Judges in that case, that we can derive little assistance from decisions; we must look at the will, and consider the intention of the testator, and if possible carry it into effect. But all the testator's lands were to be sold for payment of his

(a) 3 Brod. & Bingb. 85.

debts,

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debts, if necessary, and the residuary devise is *subject to this charge*. In *Doe v. Snelling* (a) Lord Ellenborough says, "The question hath always been whether the charge is to be paid out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events." Here it is to be paid by the devisee at all events, and therefore a fee passes.

Some other objections, which were overruled at the trial, remain to be noticed.

The declaration alleges that *Robert Isaac*, in consideration of 20s. and other good causes and considerations, granted to *Lewis Steving* the purparty or fourth part of the advowson. The deed produced purported to convey the entire advowson, but it appeared that the grantor had only the fourth part. It was objected, however, that neither what was conveyed nor the consideration is truly described. But the declaration does not profess to describe the deed *in verba*, but only to state its effect; and as *Isaac* had only a fourth part, the effect of the deed was to pass a fourth. The 20s. was the only consideration that passed.

With respect to the objection that the counter-part ought not to have been received in evidence, — the degree of diligence to be used in searching for a deed, must depend on the importance of the deed and the particular circumstances of each case. We are of opinion there was here a sufficient search.

Rule absolute for a new trial.

(a) 5 East, 91.

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GALLOWAY v. BIRD and Another.

June 30.

REPLEVIN for *taking and unjustly detaining* Plaintiff's goods. Replevin will not lie for goods delivered to a carrier, and detained by him.

Avowry, that Defendants were carriers and lightermen, and that one *C. Bache* was the consignor, and Plaintiff the consignee of the goods in question, which were delivered to Defendants, and came into their custody as such carriers, to be carried to the Plaintiff, with his knowledge and consent, and for reward *therefore payable by C. Bache*; that before the Plaintiff had any property in the goods, Defendants had given notice to *Bache* that they would detain all goods delivered to them, not only for the charges arising on such goods, but for all monies due to them on any other account from *Bache*; and that the Defendants detained the goods by virtue of a certain lien for a balance of 54*3*l. 2*s*. due to them from *Bache*, having given notice to *Bache* that they claimed such lien.

Pleas, first, that before Plaintiff had any notice of the notice given to *Bache*, Plaintiff accepted a bill of exchange in part payment of the goods, which bill he afterwards paid.

Secondly, that at the time of the delivery of the goods Plaintiff had no notice of the notice alleged to have been given by Defendants to *Bache*.

Replication to first plea, that Defendants at the time they detained the goods had no notice from the Plaintiff that he had accepted the bill of exchange.

To the second the Defendants demurred generally. The Plaintiff joined in the demurrer to the second, and demurred generally to the replication to the first. Joinder.

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The points argued were, first, whether the carriers of goods could, under the circumstances disclosed in the pleadings, detain goods from the consignee for a general lien in respect of debts due to them from the consignor.

Secondly, whether, supposing such a lien to exist as against the consignor, the fact of the consignees having paid for the goods would prevent its operating against him; and,

Thirdly, whether the action of replevin could be maintained under the circumstances mentioned in the pleading.

The Court pronounced no opinion upon the first two points; upon the third it was argued by

Wilde Serjt. that replevin lies wherever goods are unjustly taken; for which he cited *Bull. N. P. tit. Replevin, Com. Dig. Replevin, A. B., Shannon v. Shannon (a)*, and the language of Lord Ellenborough in *Dore v. Wilkinsons (b)*, recommending the frequent use of the action. The taking here was wrongful, because the Defendants received the goods under a pretended contract to carry which they never meant to perform.

Taddy Serjt. contra. The goods were delivered under a contract to be carried for hire, and in such a case there is no wrongful taking, which alone can justify a replevin. *Bac. Abr., Replevin and Avowry; Co. Lit. 145 b., Stat. Marlbr. 54 H. 3. c. 21., West. 2. 13 Ed. 1. c. 2. s. 1. Willes, 673.*

Cur. adv. vult.

BEST C. J. now delivered the judgment of the Court. This was an action of replevin, but the goods which were replevied had been delivered to the avowants upon

(a) 1 Sch. & Lefr. 324.

(b) 2 Starkie, 288.

a contract.

a contract. The authorities all lay it down that replevin can only be maintained where goods are taken, not where they are delivered upon a contract; and this is clear also upon the form of pleading, which always is that the defendant "took and detained" the goods; the plea to which allegation is, *non cepit*. No instance can be found in the Digests or Abridgments of replevin having been brought upon a delivery under a contract. Our judgment therefore must be for the Defendants.

Judgment for the Defendants accordingly.

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GIBBONS v. RULE.

June 28.

THE Defendant, a ship-broker, whose business it is to procure freight and passengers for ships, sued the Defendant, a ship-owner, for services of that description.

A ship-broker is not within the various acts for the admission and regulation of brokers.

The declaration was in the common form, for work and labour done by the Plaintiff about the business of the Defendant, at his request, and for certain commission or reward due and of right payable from the Defendant to the Plaintiff in respect thereof. Plea, general issue.

At the trial before *Best C. J.*, *Guildhall* sittings in *Easter* term last, it appeared that the Plaintiff had procured freight for the Defendant, but he had never been admitted in the court of mayor and aldermen to practise as a broker. The learned Chief Justice thinking this a fatal objection to his demand, the Plaintiff was nonsuited, with liberty for him to move to set the nonsuit aside and enter a verdict instead.

By statute 1 J. 1. c. 21., it appears that for several hundred years prior, the lord mayor and aldermen of the city had been accustomed to select out of the companies

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panies of the city persons to be presented, by at least six persons, to be brokers, who were permitted and admitted "to use and demean themselves uprightly and faithfully between merchant *English* and merchant strangers and tradesmen, in the contriving, making, and concluding bargains and contracts to be made between them concerning their wares and merchandize to be bought and sold, and contracted for within the city of *London*, and monies to be taken up by exchange between such merchant and merchants and tradesmen; and that those kind of persons so presented, allowed, and sworn to be brokers, have had and borne the name of brokers, and have been known, called, and taken for brokers, and dealing in brokerage and brokery."

And by the last section it is enacted, that nothing therein contained "shall be prejudicial or hurtful to the ancient trade of brokers within the city of *London*, using and exercising the ancient trade of brokers between merchant and merchant, or other traders or occupiers within the said city and the liberties thereof, being selected as therein mentioned."

By the 6 *Ann. c. 16. s. 4.* it is enacted, "That from and after the determination of the present session of parliament all persons that shall act as brokers within the city of *London* and liberties thereof shall from time to time be admitted so to do by the court of mayor and aldermen of the said city for the time being, under such restrictions for their honest and good behaviour as that court shall think fit and reasonable, and shall, upon such their admission, pay to the chamberlain of the said city for the time being, for the uses hereinafter mentioned, the sum of 40s., and also yearly pay to the said uses the sum of 40s. upon the 29th day of *September* in every year."

By the fifth section it is enacted, "That if any person or persons, from and after the determination of the present

present session of parliament, shall take upon him to act as a broker, or employ any other under him to act as such within the said city and liberties, not being admitted as aforesaid, every such person so offending shall forfeit and pay to the use of the said mayor and commonalty and citizens of the said city, for every such offence, the sum of 25*l.*, to be recovered by action of debt in the name of the chamberlain of the said city, in any of her Majesty's courts of record, in which no protection, essoin, or wager of law shall be allowed, or any more than one imparlance." This act of parliament (as expressed in the preamble) was passed in favour of the city for the purpose of indemnifying it against the loss which it sustained in consequence of being deprived of the right of garbling spices, &c. The legislature apparently intended that an equivalent should be paid by a duty on those persons who acted as brokers of garbled articles.

By the 57 *G. 3. c. 60.* the fee of admission of brokers is increased to 5*l.*, and by the second section it is enacted,

"That so much of the recited act of 6 *Ann. c. 16.* as imposes a penalty of 25*l.* upon any person who shall take upon him to act as a broker, or employ any person under him to act as such, not being admitted in pursuance of the said recited act, shall be, and the same is hereby repealed; and that from and after the passing of this act, if any person shall take upon him to act as a broker, or employ or cause, permit or suffer, any person or persons to be employed with, under, or for him, to act as such within the city and liberties, not being admitted in pursuance of the said recited act, every such person so offending shall forfeit and pay to the use of the mayor and commonalty and citizens of the said city, for every such offence, the sum of 100*l.*, to be recovered by action of debt in the name of the chamberlain of the said city, in any of his Majesty's courts of record, in which no protection, essoin,

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or wages of law shall be allowed, or any more than one imparlance."

Taddy Serjt., in *Easter* term, moved to set aside the nonsuit; and referring to the preceding acts of parliament, contended, that the Plaintiff was not a broker within the meaning of any of them; and he alleged that the point had been decided in 1820, in the *Mayor of London v. Cuffe*. (a) In that case an action for penalties had been brought against the Defendant for having, without admission by the court of lord mayor and aldermen, acted as a broker in the procurement of freight, passengers, and cargo; and the Plaintiff was nonsuited by *Abbott C. J.*, on the ground that the acts relating to brokers did not apply to ship-agents.

A rule *nisi* having been granted,

Wilde Serjt., who shewed cause, relied on the statute 57 G. 3. c. 60. s. 2., which was general in its terms, and not confined by its preamble like the 6 Ann. c. 16. to brokers of garbled articles: he then argued, that all contracts made in contravention of the provisions of a statute were void, and he cited the language of Lord Holt in *Bartlett v. Vinor*. (b) — *Hinckley v. Walton* (c), *Drury v. Defontaine* (d), *Langton v. Hughes*. (e)

Taddy Serjt., in support of the rule, insisted that all the acts were in *pari materia*; and with respect to the cases cited, he distinguished between contracts by persons prohibited to enter into them, and contracts on subject-matters prohibited, arguing that the latter only were void, and that the former were available though the parties contracting might be liable to punishment:

(a) Not reported.

(b) *Cartb.* 252.

(c) 3 *Taunt.* 131.

(d) 1 *Taunt.* 131.

(e) 1 *M. & S.* 593.

as in *Johnson v. Hudson* (a), where it was holden, that an unlicensed dealer in tobacco might sue for tobacco he had sold.

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BEST C. J. This was an action to recover a sum claimed by the Plaintiff, for his trouble in procuring freight and passengers for a ship belonging to the Defendant.

At the trial before me at *Guildhall* it was objected, that as the bill was for brokerage, and as the Plaintiff had not been admitted a broker, pursuant to the statute 6 Ann. c. 16. s. 4., his acting as such was illegal, and that, consequently, this action would not lie. Upon looking into the act, we are all of opinion that the Plaintiff is not a broker within the meaning of the statute of *Anne*. That is a penal act, and must receive a strict construction. Before we subject the Plaintiff to its provisions we must be satisfied that he comes within the letter as well as the spirit of the act. But it does not appear, that at the time of passing that act there existed any class of persons carrying on the Plaintiff's vocation. Merchants then transacted their own business, and did not load the commerce of the country with heavy commissions unnecessarily paid. Undoubtedly, persons engaged in procuring freight for ships, and in conducting their transfer, are now styled brokers in ordinary language, and perhaps in some recent statutes; but they are not brokers in the legal acceptation of the term before the passing of the statute of *Anne*. *Spelman* calls a broker *Proxieta*, and the word seems to have been applied to persons engaged in business in general; but originally it signified a retailer or pedlar. Such persons being conversant with traffic were, probably, afterwards employed by the great merchants, to assist them in dis-

(a) 11 East, 180.

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posing of their commodities; but their business was confined to buying and selling of goods. In process of time the class of exchange brokers arose, and, much later, pawnbrokers. In *Jacob's Law Dictionary*, brokers are described, "Those who make bargains in matters of money or merchandize;" and he enumerates "exchange-brokers, corn-brokers, pawnbrokers." In *Blunt's Law Dictionary*, we find "exchange-brokers, mediators in any contract of buying and selling, or contracts of marriage, and pawnbrokers." In *Cowell* the same description; but he adds, "that pawnbrokers are not of the same antiquity as the others."

According to all these definitions, therefore, brokers are persons concerned in exchange, or in buying and selling goods; and the statutes have adopted these definitions. The title of 1 *Jac.* 1. c. 21. is, "An act against brokers;" and the preamble says, "Forasmuch as of long and ancient times certain freemen have been solicited to be *brokers*, and have taken oaths, 'to use and demean themselves uprightly between *English* merchants and merchant strangers, and tradesmen, in making contracts to be made between them, *concerning their wares and merchandizes to be bought and sold*, and monies to be taken up by exchange between such merchant and merchants and tradesmen; and such persons have had the name of brokers, and have been known, called, and taken for brokers, and *dealing in brokerage and brokery*, who of ancient times used to sell or to take pawns," &c. Here, therefore, is the description of the various classes of brokers known at that time. The statute 8 & 9 *W. 3.* c. 20. speaks of brokers employed in buying and selling tallies, which were the government securities of that time; in other words, stock-brokers. Then an expired act of the same reign, 8 & 9 *W. 3.* c. 32., entitled "An act to restrain the number and ill practice of brokers and stock-jobbers," after reciting "that brokers had been

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been anciently admitted for the making and concluding bargains and contracts concerning goods, wares, and merchandizes, and monies taken up by exchange" (these words are nearly the same as those of the statute of *James*), "and for negotiating bills of exchange between merchant and merchant, that these have been used to raise and fall the value of tallies, government debts, and bank stock for their own private interest;"—with a view to prevent the increase and regulate the practice of these persons, proceeds to say, "that no person shall exercise the business of a *broker*, or act as such in the money bargains concerning wares and *merchandizes to be bought and sold*, or monies to be taken up by exchange or tallies"—and then enumerates various sorts of bills and securities for money then bought and sold,—“until that person be admitted a broker.” Then it requires from him an oath and bond duly to practise the business of a broker, according to the provisions of that statute. But all its provisions apply to persons buying and selling goods or government securities, and not to ship-brokers. This statute, which was in force only three years, was followed by the 6 *Ann. c. 16.*, one object of which was, to compensate the then existing garbler of spices, and another, to supply the place of the expired statute of *William*. It accordingly prescribes regulations for the class of brokers, which must mean persons then known to the law of the country as such, referred to in different statutes, and described by the law writers. But at that time ship-brokers did not exist. The exporters and importers of goods had ships of their own, or if they hired them, hired without the intervention of an agent. In *Jansen v. Green (a)*, which was an action for penalties against a party for acting as a stock-broker, without being sufficiently authorized, Lord *Mansfield*

(a) 4 *Burr.* 2103.

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said, "Sir J. Barnard's act is conclusive: it directs that every broker or other person, who shall negotiate or act as a broker, receiving brokerage, in the *buying or selling, or otherwise disposing of any of the said public or joint stocks*, or other public securities, shall keep a book, which shall be called the 'broker's book.' Can words more strongly express what the parliament meant by a broker?"

And Yates J. said, "We will follow the parliamentary idea of a broker." We must do the same thing; but we shall not pursue the parliamentary idea of the word broker, if we include a party who neither buys nor sells, but is merely concerned in the hiring and management of ship-property.

The 57 G. 3. c. 6. is expressly applied to such brokers as come within the provisions of the statute of Anne, specifying persons "admitted brokers in pursuance of the said act." It then repeals the penalty created by that act; and provides, that persons acting as brokers, not being admitted in *pursuance of that act*, shall forfeit 100*l*. The Court is therefore of opinion, that persons following the vocation of the Plaintiff are rather agents than brokers; that at all events they are not such brokers as were contemplated by the statute of Anne, and that therefore the rule for setting aside the nonsuit in this cause must be made absolute.

Rule absolute accordingly.

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BREESTON v. COLLYER.

June 30.

THIS was an action of assumpsit, brought by a clerk to an army-agent for an alleged breach of contract, in discharging the Plaintiff before the end of the year which he claimed to serve under a yearly hiring.

The declaration stated, in all the counts, that the Defendant, on the 1st of *March* 1793, retained the Plaintiff in his service as a clerk, at a certain salary, "for one whole year from the day and year aforesaid, and afterwards as long as the Plaintiff and Defendant should respectively please, until the expiration of the current year from the said 1st of *March*;" that the Plaintiff stayed in the Defendant's service on the terms aforesaid until the 23d of *December* 1826, and was willing to continue until the expiration of the current year on the 1st of *March* 1827, but that Defendant discharged him on the 23d of *December* 1826.

At the trial of the cause before Best C. J., *Middlesex* sittings in this term, the Plaintiff's son proved a quarterly payment of 125*l.* on the 24th of *June* 1811, and that there were entries of quarterly payments in that year in the Defendant's books, but that during the last six years the salary had been received monthly on the 25th of the month: he remembered his father in the Defendant's service since 1806. On the 23d of *December* 1826, he received his discharge.

The Chief Justice told the jury, that the payment of the quarter's salary in 1811 was evidence of a yearly hiring, although the salary was afterwards paid monthly. That the general rule was, that if a servant were hired, he was deemed to be hired for a year, under certain qualifications; and though the usual contract with

menial

The Plaintiff, commencing his service in *March*, served the Defendant, an army agent, for many years in the capacity of his clerk. In 1811 Plaintiff's salary was paid quarterly: for the last six years before 1826, it was paid monthly. Defendant having dismissed the Plaintiff in *December* 1826, without assigning any reason: Held, that there was an implied yearly hiring; that Defendant must pay the salary till *March*, and that the contract need not be in writing.

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menial servants was for a month's wages or a month's warning, it was not the case with servants of the Plaintiff's description.

The jury having found a verdict for the Plaintiff—
83*l.* damages,—

Wilde Serjt. moved to set aside this verdict, and enter a nonsuit, on the ground, that in the absence of any evidence of an express hiring for a year, there was no reason for implying a yearly hiring under the circumstances of the present case, and the less so, as the later and more numerous payments had all been monthly: he also objected, that there was no count in the declaration applicable to such a hiring. A rule was granted; against which

Spankie Serjt. shewed cause. In support of the rule,

Wilde urged, that at the utmost, the declaration stated only a contract for one year, but nothing to shew that the hiring was to be yearly after the expiration of the first year. In *Johnson v. Huddleston* (a), where there was a question, Whether a hiring of certain premises were from year to year or not, the demise was from the 26th of *March* for one year next ensuing, and so from year to year, for so long as the landlord and tenant should respectively please. That was holden to constitute a tenancy from year to year; but the declaration in the present case said nothing of any contract from year to year; and even had that been so, it was doubtful whether a contract for a service, which was not to be completed within a year, could be supported in law without a writing; for in *Bracegirdle v. Heald* (b), it was held, that a contract for a year's service, to com-

(a) 4 B. & C. 922.

(b) 1 B. & A. 712.

monce at a subsequent day, being a contract not to be performed within a year, was within the fourth section of the statute of frauds, and must be in writing.

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BEST C. J. I entertain no doubt on the law or justice of this case. The Defendant has not suggested any reason for ending the service of the Plaintiff; and it would be, indeed, extraordinary, if a party, in his station of life, could be turned off at a month's notice, like a cook or scullion.

If a master hire a servant, without mention of time, that is a general hiring for a year, and if the parties go on four, five, or six years, a jury would be warranted in presuming a contract for a year in the first instance, and so on for each succeeding year, as long as it should please the parties: such a contract being implied from the circumstances, and not expressed, a writing is not necessary to authenticate it. It is not necessary for us now to decide, whether six months, three months, or any notice, be requisite to put an end to such a contract, because under the circumstances of the present case, after the parties had consented to remain in the relation of employer and servant from 1811 to 1826, we must imply an engagement to serve by the year, unless reasons are given for putting an end to the contract. The Defendant put an end to this engagement, without assigning any reason, and the jury, therefore, were warranted in the finding they have come to. The principles upon which the action for use and occupation proceed are the same as those which formed the ground of my direction to the jury upon the present occasion. The contract is for a year at first, and if the parties do not disagree, it goes on from one year to another. It is true that one of the incidents of a tenancy of this kind is, that it can only be determined by a half year's notice, concluding with that day on which the tenancy commenced.

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commenced. We do not say that such terms are to be engrafted on contracts for the hire of servants. But the contract between the parties in this cause has been accurately described, in the first count of the declaration, as a contract for one whole year, and afterwards as long as the Plaintiff and Defendant should respectively please, until the expiration of the current year from the 1st of *March*: that allegation has been proved in evidence by acts from which such a contract would be implied, and being so implied, it was not necessary that it should be reduced into writing.

PARK J. We do not decide what notice to quit, if any, is requisite under a hiring like this; but the question is, Whether the Plaintiff, who has served his employer so many years, can be turned off without any reason being assigned? Here there is evidence that the salary was once paid quarterly, and though it was afterwards paid monthly, yet as there was no change in the nature of the Plaintiff's employment, such payment is perfectly consistent with a yearly hiring, and might have been made for the convenience of the Plaintiff. If any ground had been assigned for the Plaintiff's dismissal, the decision might have been different, but not the slightest reason is given. There was evidence to go to the jury of a hiring for a year, and I approve of their finding. Persons in the situation of the Plaintiff must be supposed to possess superior acquirements, and are entitled to more respect than to be turned off without any reason being assigned.

BURROUGH J. I can discover no objection to the declaration, and the evidence adduced at the trial has been sufficient to prove it. Unless reasonable notice were given, or ground for dismissal assigned, the Defendant was bound to go on to the end of the year.

GASELEE J. There can be no doubt that a general hiring is a hiring for a year. In domestic service there is a common understanding that such a contract may be dissolved on reasonable notice; as a month's warning, or a month's wages. There does not appear to be any such practice with respect to servants in husbandry, and we have no evidence what is the custom with clerks. We must, therefore, decide this case according to the general rule, and hold the contract between the parties to be a hiring for a year.

Rule discharged.

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COLLYER v. WILLOCK and Others, Executors.

July 2.

IN 1818 the Defendant's testator, an auctioneer, sold to the Plaintiff by auction, among other property, a cottage and land under the following condition of sale: "That the purchasers pay down immediately into the hands of Mr. Willock a deposit of 20*l.* per cent. for lots 1, 2, 3, 4, 6, 7, 8, 9, and 10., and 15*l.* per cent. for lot 5., in part of the purchase-money, and sign an agreement to complete their purchase-money on or before Michaelmas day 1818, upon having good titles made to them; and if from any cause whatever the purchase of any lot or lots be not then completed, the purchase-money for such lots shall immediately be invested in exchequer bills in the joint names of the vendors and purchasers, until such purchase or purchases shall be completed."

Where a party revives a debt barred by the statute of limitations, by paying it into Court, but at the same time refuses to pay interest, such payment of the principal does not revive the claim for interest.

A good title to lot 5. (the cottage in question) was not made by Michaelmas 1818, nor at any time afterwards, and the title to the other lots was contested in Chancery till 1823. In Michaelmas 1826 the Plaintiff commenced this action to recover 20*l.*, the deposit paid upon

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upon lot 5, and interest thereupon. The Defendants, who pleaded the statute of limitations, also tendered and paid into court the 20*l.*, but refused to pay the interest claimed; and it was objected at the trial before *Best* C. J., that the statute of limitations was a bar to any claim which the Defendants did not acknowledge. A verdict for 10*l.* (8*l.* for interest, and 2*l.* for certain expences incurred in 1823) was found for the Plaintiff at the *Middlesex* sittings after last *Easter* term, with leave for the Defendants to move to set it aside and enter a non-suit. A rule *nisi* having been obtained,

Taddy Serjt., who shewed cause, endeavoured to shew that the case was taken out of the statute by the proceedings in Chancery which had continued to the year 1823; but it appearing on the Judge's notes that those proceedings did not apply to the cottage in question, he insisted that the acknowledgment of debt made by the tender of the principal virtually included an acknowledgment of the interest as accessory; and he argued, that the condition to invest the deposit money on the sale in exchequer bills amounted to a contract to pay interest, binding on the auctioneer, though without such a contract, interest perhaps might not be payable on a deposit.

Wilde Serjt., in support of the rule, contended, that a new promise was necessary to revive a claim barred by the statute, and that the Defendants, so far from promising, had refused to satisfy the present claim.

BEST C. J. I think the payment of the principal does not take the case out of the statute of limitations, as far as regards the claim for interest. Payment of the principal does not raise any implied promise to pay the interest; and so far from there being any actual promise, the party here expressly refused to pay interest.

PARK

PARK J. and BURROUGH J. expressed a similar opinion, in which GASELEE J. having also concurred, the rule was made

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HENNING'S v. ROTHSCHILD.

July 2.

THIS was an action for money had and received by the Defendant to the use of the Plaintiff. The declaration contained also counts for money lent, money paid, and upon an account stated. Plea, non-assumpsit.

The jury found a verdict for the Plaintiff, for 1235*l.* 1*s.* 9*d.*, subject to the opinion of the Court upon a case, which stated in substance

That the Defendant, on the 14th day of *October* 1822, made and signed six receipts in the words and figures following :

“ NEAPOLITAN LOAN BY N. M. ROTHSCHILD, contracted by C. M. de Rothschild :

Neapolitan five *per cent.* certificates, No. 433. with interest from the 1st *July* 1822 :

Received one hundred and thirty-seven pounds four shillings and eight-pence, being ten *per cent.* on

the deposits should be forfeited in case of nonpayment of the balance. L. forthwith transferred the receipts to Plaintiff for valuable consideration. Defendant then, by public advertisement, offered the holders of these receipts, upon certain conditions, an extension of time for payment of the balance due on them, requiring also that the receipts should be left at his office, for the purpose of being marked as holden under the new conditions. The receipts transferred by L. to the Plaintiff were by him, accordingly, sent to the Defendant's office, where they were indorsed by the Defendant with the Plaintiff's name. The Plaintiff and others having failed to comply with the new conditions, the Defendant refused to deliver the certificates or to return the deposits : Held, that the Plaintiff might, in an action for money had and received, recover of the Defendant the amount of the deposits paid by L.

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Ducats 500, *Neapolitan rentes*: On payment of the balance on or before the 1st *February* 1823, with four *per cent* interest thereon from the 15th *October* 1822, the bearer will be entitled to certificates for that amount of stock with interest coupons from the 1st *July* 1822.

	£	s.	d.
Ducats 500, rentes at 80 <i>per cent.</i> ; exchange, fr. 4-40 <i>per</i> ducat, and fr. 25,65 <i>per</i> £ stg.	-	-	1372 6 5
10 <i>per cent.</i> deposit	-	-	137 4 8
			<hr/>
Balance to pay the 1st <i>February</i> 1823, with 4 <i>per cent.</i> interest from 15th <i>October</i> 1822	-	-	1235 1 9
			<hr/>

Entered, *C. H. Thiel*,
J. S. Thompson.

London, 14th *Octr.* 1822, "
N. M. Rothschild."

(The other five were in the same form.)

That upon these several receipts the Defendant, on the 14th day of *October* 1822, received from one *Lowe* the sum of 1235*l.* 1*s.* 9*d.*, and delivered the receipts to *Lowe* :

That the receipts came into the possession of the Plaintiff in manner following:—The Plaintiff had advanced 1600*l.* to *Lowe*, on the 2d *November* 1822, on the credit of the receipts, on which day the receipts were delivered by him to the Plaintiff; and on the 3d *December* 1822, the account was settled by the Plaintiff taking the receipts in part payment at the rate of 77½ *per cent.*, and the Plaintiff thereupon became the holder of such receipts for his own benefit :

That the Defendant, on the 14th and 15th days of *January* 1823, caused the following notice and advertisement

inserted to be inserted in a public newspaper called *The Times*, of which the Plaintiff then had notice:

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"Neapolitan Loan of 1822."

"Mr. N. M. Rothschild begs to notify to the holders of the deposit-receipts of this loan, that the parties may either pay them in full on 1st *February* next, according to agreement, or that this period may be extended at their option, on the condition of a further payment of 10 *per cent.* on the stock being made on the 1st *February* next, with the interest due on the receipts up to that day, 10 *per cent.* on do. on the 1st *March* next, 20 *per cent.* on do. on the 15th *April* next, 10 *per cent.* on do. on the 15th *May* next, and the remainder on the 15th *July* next, with interest at the rate of 4 *per cent.* from the 1st of *February*, payable as these amounts become due. At the time the foregoing payments are made, the parties will be allowed to receive bonds equivalent to the amount paid, or as nearly so as the case will admit. Those persons who intend availing themselves of the extension here granted, are desired to leave their receipts at Mr. *Rothschild's* counting-house any day between the 20th and 25th instant, in order that the same may be duly marked, and other receipts prepared for delivery on the 1st *February*.

"New Court, London, 11th January 1823."

That in consequence of the before-mentioned advertisement, the Plaintiff caused the following note to be sent to Defendant, which was received by him:

"21st January 1823."

"N. M. Rothschild, Esq."

"Sir,

"I beg leave to hand you inclosed six ten *per cent.* scrip certificates of the *Neapolitan* loan, amounting,

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as per specification at foot, to 4500 ducats rentes, on the capital of which, 12,350*l.* 17*s.* 6*d.*, I wish to avail myself of your offer to pay on 1st *February* 10 *per cent.* only, and I request, therefore, that you will have the goodness to cause the certificates to be prepared to that effect.

“C. F. Hennings.”

That the six several receipts were left at the Defendant's counting-house on the same 21st *January*, in order to get them marked :

That they were on the following day respectively marked by the clerk of the Defendant, and by his authority, pursuant to the notice and advertisement of the 11th *January* 1823, with the following words thereon, “4500 ducats *per C. F. Hennings*,” and the receipts so marked were re-delivered by the Defendant to the Plaintiff :

That the following advertisement was inserted by the Defendant in the public newspaper called *The Times*, published on the 24th of *January* 1823, —

“*Neapolitan Loan of 1822.*”

“At the request of several of the holders of the *Neapolitan* scrip receipts, a further extension for the payment of the balances will be granted by Mr. N. M. Rothschild as follows : viz. 5 *per cent.* to be paid on, 1st *February* next, with interest due on the receipts up to that day ; 5 *per cent.* on do. on the 1st *March* next ; 10 *per cent.* on do. on the 15th *April* next ; 10 *per cent.* on do. on the 15th *May* next ; 10 *per cent.* on do. on the 15th *June* next ; 10 *per cent.* on do. on the 15th *July* next ; and the balance on the 15th *August* next, with interest at the rate of 4 *per cent.* from 1st *February*, payable as these amounts become due :

“The

110. "The parties who intend availing themselves of this arrangement, will leave their receipts at Mr. *Rothschild's* counting-house, as pointed out in his advertisement of the 11th instant, in order that new scrip receipts of corresponding amounts may be prepared for delivery on the 1st of *February* next.

" *New Court, London, 23d January 1823.*"

The following on the 5th of *February 1823*, —

" *Neapolitan Loan of 1822.*

"Many of the holders of Neapolitan deposit receipts having failed to comply with the tenor of those engagements, by which the parties were required to pay the balances thereof on the 1st of *February 1823*, with the interest accruing up to that day, and not having availed themselves of the terms proposed for their accommodation in the advertisements of the 11th and 23d of *January* last, public notice is given by Mr. *N. M. Rothschild*, that such receipts are void, that the deposit-money is forfeited, and that all obligation has ceased on his part to deliver certificates at a future period.

"Being desirous, however, that no individual should suffer unknowingly on this occasion, Mr. *Rothschild* hereby notifies that he will grant to the holders of his receipts an indulgence of one week from this date, either to pay the balances due by them on the 1st instant, or to make the further deposits called for by the advertisements of the 11th and 23d of *January* last.

" *New Court, 5th February 1823.*"

And the following on the 11th of *February*, —

" *Neapolitan Loan of 1822.*

"Referring to the several advertisements of the 11th and 23d of *January* last, and 5th of *February* instant,

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which have appeared in the public papers, giving an extension of time for payment of the balances due upon scrip receipts for the *Neapolitan* loan, *N. M. Rothschild* informs the holders of scrip receipts, that the loan contracted for has been paid, and the stock certificates are ready for delivery; and he begs that those who have not accepted the terms of extension of payment will take notice that unless the terms are accepted or the balances and interest thereon paid on or before the 20th of *February* instant, he will consider that such holders of scrip receipts do not intend to complete their contracts, and will not hereafter claim the certificates. *N. M. Rothschild* will, therefore, after the 20th of *February* instant, dispose of or keep the certificates, and put the proceeds or value of them to the credit of the holders on account of the balances and interest due, and hold them answerable to him for any loss or deficiency."

That on the 11th *March* 1823, the following letter was received by the Plaintiff, written by *W. Henry Green*, who is the attorney upon the record for the Defendant in this action :

" Sir,

" I am desired by Mr. *M. N. Rothschild* to express to you his surprise that you have not yet made the further payments on the *Neapolitan* scrip engagements specified in your letter of the 21st *January* last, after having there stated you should avail yourself of the terms of his offer. With every desire to avoid the adoption of measures which might be unpleasant to you, he cannot suffer a matter of this consequence to remain unsettled; and my instructions are to commence proceedings against you forthwith if these payments be not immediately made.

" *W. H. Green.*"

" To Mr. *Hennings.*"

That

That on the 14th *May* following, the Plaintiff called upon the Defendant, and told him that he came to receive or pay up the *Neapolitan* certificates, and then tendered to the Defendant 11,378*l.*, which was equal to the amount of the instalments stipulated by the receipts to be paid, and 5 *per cent.* interest thereon:

That the Defendant refused to accept this sum, and said, "You are too late; you must go to my lawyer."

That on the 23d of *June* last the Plaintiff addressed the following letter to the Defendant, —

"Sir,

"I beg leave to say I again offer to pay you the balance, with interest up to the present time, remaining due upon the scrip receipts 4500 ducats *Neapolitan* rentes, upon having the stock certificates with interest coupons belonging thereto delivered to me. And if you continue to refuse to deliver the said stock certificates, I require an immediate return of the deposit-money received by you upon those scrip receipts, with interest thereon, and if you decline to do either, which on consideration (especially as my claim stands on different grounds from those of other holders of *Neapolitan* scrip), I trust will not be the case, I shall be under the necessity of commencing an action against you to recover the same."

That such letter was delivered to the Defendant by the clerk of the Plaintiff, that Defendant read it, threw it down, and said, "I can only tell you that you must go to my lawyer about it:"

That the *Neapolitan* scrip began to fall on the 1st *February* 1823, and continued to fall until the latter end of *April*, and fell to 67, but the beginning of *May* following the entry of the *French* army into the city of *Madrid* occasioned a rise, and the scrip rose in consequence about 8 *per cent.* from its lowest price:

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That the Plaintiff purchased the certificates of Mr. *Lowe* at 77½, and by *March* they had fallen to 67½.

That they had been gradually rising for some time when the Plaintiff tendered the money to the Defendant.

This case was argued by

Taddy Serjt. for the Plaintiff, and *Wilde* Serjt. for the Defendant. The points contested were, whether the Plaintiff could recover, in an action for money had and received, the sums paid to the Defendant by *Lowe*; and, if he could, whether he had not forfeited his claim by neglecting to fulfil the conditions imposed by the Defendant.

Upon the first point *Taddy* contended that the receipts were in the nature of notes payable to bearer, and that where money had been paid to the use of the bearer or holder of such an instrument, he might sue for it in an action for money had and received, although there was originally no privity between him and the Defendant. *Grant v. Vaughan* (a), *Ward v. Evans* (b), *Wilson v. Coupland* (c), *De Bernales v. Fuller* (d), *Dutch v. Warren* (e). But here the Defendant by his notice to holders, and by marking the receipts, had recognised the Plaintiff as standing in the same situation as *Lowe*, and in effect had expressly promised to pay him; and though at law no claim arose upon the assignment of a chose in action, yet such an assignment was a sufficient consideration for an express promise. *Fenner v. Mcarees* (f), *Vere v. Lewis* (g), *Tatlock v. Harris* (h), *Surtees v. Hubbard* (i).

(a) 3 *Burr.* 1516.

(b) 2 *Ld. Raym.* 928.

(c) 5 *B. & A.* 228.

(d) 14 *East*, 590.

(e) 2 *Burr.* 1011.

(f) 2 *Bl. Rep.* 1269.

(g) 3 *T. R.* 182.

(h) 3 *T. R.* 174.

(i) 4 *Exp. per Kenyon C.J.* 204.

Then,

Then, with respect to the conditions imposed by the Defendant, they were no part of the original contract, and therefore could not be binding either on *Lowe* or on any one who stood in his place.

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Wilde contra. The action does not lie. The money never was received to the use of Plaintiff, nor even of *Lowe*, but to the use of *Rothschild* the Defendant, in part payment of the *Neapolitan* loan. The Defendant never contracted to return money to *Lowe* under any circumstances, but, if *Lowe* performed his engagement, to give him certificates. If, however, it should be holden that the original contract between *Lowe* and the Defendant has been avoided, and that there is an implied contract to return the deposits, the money, at all events, must belong to *Lowe*, and not to the Plaintiff. A general promise made to a class of persons cannot be sued on by an individual; — *Phillips v. Bateman* (a); and where a contract has been altered or transferred, and the consideration is to be refunded, it can only belong to the party with whom the contract was originally made, unless, indeed, the instrument containing the contract be assignable, as it was in *Grant v. Vaughan*, — a circumstance on which that decision mainly turned. The other cases cited are not applicable to the present. In *De Bernales v. Fuller*, *Fenner v. Meares*, *Wilson v. Coupland*, and *Tatlock v. Harris*, there were express promises on the part of the defendants; and in *Dutch v. Warren*, the defendant having refused to perform his contract, the plaintiff was entitled to recover. Here the contract has been broken and abandoned by the Plaintiff, who, when the stock was low, chose to recede from his bargain, but endeavoured to retrieve himself as soon as the

(a) 16 East, 356.

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stock rose. It would be great injustice to put it in his power so to play fast and loose.

Cir. adv. vult.

BEST C. J. now delivered the judgment of the Court.

This was an action for money had and received, brought by the Plaintiff against the Defendant, to recover certain deposits which had been paid to the account of the *Neapolitan* loan.

The cause was tried some years ago by my Brother *Burrough*, and a special verdict was found. I shall state very shortly the facts of that special verdict, as applicable to the question which the Court to-day are called upon to decide.

It appears, that on the 14th October 1822 the Defendant received 1235*l.* 1*s.* 9*d.* from a person of the name of *Lowe*; and 1235*l.* 1*s.* 9*d.* is the sum which the jury have given their verdict for: that was for five receipts, which are set out in the special verdict, and upon which receipts it appears that the remainder of the money which was to be paid for the completion of the contract for the *Neapolitan* loan, was to be paid before the 1st February 1823. Thus, as the case stood upon the first contract, unless the Plaintiff paid the remainder before the 1st February 1823, he would not be entitled to certificates for *Neapolitan* stock.

These receipts, in the hands originally of *Lowe*, were, on the 2d November 1822, shortly after their execution, which was in October 1822, passed to the present Plaintiff for the full consideration. It also appears, that he remains till this moment the holder of these receipts.

On 11th January 1823 the Defendant published an advertisement, giving further time to pay by instalments the remainder of what was to be advanced, as the consideration of receiving the certificates of the loan.

All

All those instalments, it is material to observe, were to be paid on or before the 15th *July* 1823, and the persons who wished to avail themselves of the indulgence given by that letter were to send the receipts of which they were the holders to the office of the Defendant, to have them indorsed, and to have other receipts prepared.

There was, also, this condition introduced into that letter; "on condition of paying 10 *per cent.* on the 1st *February*, and the other instalments as they were to become due," — specifying certain times, the last being, as I have stated, the 15th *July* in that year.

It appears by the special verdict, that the Plaintiff, by letter of the 31st *January*, declared that he should avail himself of that offer; that is, that instead of paying the whole on the 1st *February*, he was to pay 10 *per cent.* upon the 1st *February*, and the remainder by different instalments. He sent his receipts, and they were all marked, and it is material to one of the questions how they were marked. These receipts were indorsed, "*C. F. Hennings*," so that by that indorsement the Defendant acknowledges that he is in future to deal with the Plaintiff as the holder of these receipts, and the proprietor of any rights that may arise out of them. The receipts, being indorsed, were returned to the Plaintiff. Subsequent proposals were made, by advertisements of the Defendant, on the 23d *January* 1823. It is not necessary to mention them, because they will not affect either of the questions. On 5th *February* 1823 he again stated by advertisement, that those who had not complied with the terms of the former offer, had forfeited their deposit-money, and that he was not bound to deliver the certificates; but that still he would give them another week.

: Then, on 11th *February*, he published the following letter: "Referring to the several advertisements of the

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11th and 22d *January* last, and 5th *February* instant, which have appeared in the public papers, giving an extension of time for payment of the balances due upon scrip receipts for the *Neapolitan* loan; *N. M. Rothschild* informs the holders of scrip receipts that the loan contracted for has been paid; " (if that had been proved, it would have been material, and would have been an answer to the Plaintiff's action; but there is no proof of that; nothing of that sort is found by the special verdict, and it is only the assertion, therefore, of the Defendant;) " and the stock certificates are ready for delivery; and he begs, that those who have not accepted the terms of extension of payment will take notice, that unless the terms are accepted, or the balances and interest thereon paid on or before the 20th day of *February* instant, he will consider;" (*he will consider*) " that such holders of scrip receipts do not intend to complete their contracts, and will not hereafter claim their certificates: *N. M. Rothschild* will, therefore, after the 20th *February* instant, dispose of" (this is the part I would wish to call the attention of the Court to) " or keep the certificates, and put the proceeds or value of them to the credit of the holders, on account of the balances and interest due, and hold them answerable to him for any loss or deficiency." That is, he will exercise, himself, a discretion uncontrolled by the other person who has the interest in them, either to keep them himself or dispose of them, if he thinks proper, and to hold the person who has the interest, and whom he has not consulted, accountable for any deficiency there may be. I guess that is his meaning; but it is so unskillfully expressed, that it is impossible to say with certainty what is the meaning of the advertisement.

On 11th *March* the Defendant's attorney calls upon the Plaintiff to pay his instalments, and threatens an action

action, if these instalments are not immediately paid. On 14th May 1823, the Plaintiff sends to pay all instalments that were then due, with interest. It will be observed this was before the 15th July, when the last instalment was to be paid. The Defendant refused to accept that offer, or On 3d June the Plaintiff again tendered the instalment and interest, which was refused again by the Defendant. It still be observed, however, that from the 1st February to the 14th May, no offer was made to pay all the instalments with interest; that the Plaintiff had not complied, either with the conditions contained in the original receipt, or with any of the conditions contained in those advertisements by which the terms of the original receipts were enlarged for the benefit of the holder of these receipts, or perhaps enlarged, because, if the holders of the receipts had been called upon to pay on the 1st February, the defendant knew from the then state of the market, that not one of them would have been taken, and the whole loan would have been thrown upon his hands, or, in fact, have been entirely destroyed, because it appears from the facts stated in this case, that during all that time they were at a great discount, and it was not till the French army got possession of Madrid that they began to rise, and people thought it worth their while to pay their instalments upon them.

Undoubtedly it appears that the Plaintiff in this case did not comply with those conditions with which he ought to have complied, and, therefore, it is perfectly clear that he forfeited his right to recover the certificates for the loan, because, I take it, it is a condition precedent to his recovering the certificates for the loan, that he should make the payments at the periods stipulated; but that will not bear upon the present question, though our attention has been ingeniously attempted to be drawn

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away from the consideration of that question by discussing it as if this were a claim for the certificates of the loan, and not for the deposit-money. The Plaintiff, undoubtedly, was endeavouring here to play fast and loose. Whilst it was a losing concern, he was not desirous of making further advances; the moment it became a concern out of which he was likely to derive a profit, he was extremely desirous, if he could, to pay up what he forbore to pay whilst it was a losing concern, and claimed the benefit of the contract which had been entered into with him. I have already stated that the Plaintiff had not complied with the condition contained in the first advertisement, nor had he paid any of the instalments which became due from the 1st February to the 16th May, and from these circumstances it appears that by the enlarged time given for the raising of this money, several instalments had, in the intermediate time, become due.

Upon these facts two questions arise: first, does the failure on the part of the Plaintiff to pay the balance on the 1st February 1823, and his failure in complying with the conditions upon which he was allowed by the different advertisements to pay it by instalments, prevent the Plaintiff from recovering the deposit? — that is, considering that he is to be taken as the first advancer of the money: — the next question is, suppose the Plaintiff not to be prevented from recovering the deposits, if he had been the person who originally made them, as the deposits were originally advanced by *Lowe*, can the Plaintiff, under the circumstances of this case, recover those deposits as money had and received by this Defendant to the use of the Plaintiff? The case upon the first point is clearly distinguishable from any case that I have been able to find, and no case exactly like it was cited at the bar. Cases which have been decided upon the

the principle that if a contract be put an end to, one of the contracting parties may recover back money which has been advanced upon it, as money that has been advanced upon a consideration that has failed, have been cases where the default has been on the part of the Defendant, and where there has been no default on the part of the Plaintiff. This case is different from those, because in this case, undoubtedly, the present Plaintiff has been the defaulter: he has failed in the performance of the condition in the first contract, and he has failed in the subsequent payments. The question, therefore, is, he himself being a defaulter, is he entitled, under the circumstances of this case, to recover the deposits? The Defendant in some of his subsequent advertisements has stated that the deposits were forfeited; but it is not his declaration that will amount to a forfeiture of the money, unless that condition exists in the original contract made between him and the parties. Now it will be observed, that in the original contract, which is evidenced by the first receipts, there is no such condition as that the deposits shall be forfeited if the further sums of money which are to be paid for the purpose of completing the Plaintiff's right to the certificates of the *Neapolitan* loan shall not be paid.

We are of opinion that there being no such condition as that in the original contract, the Plaintiff has a right to recover the deposits, under the circumstances which have occurred in this case. In sales by auction it is constantly introduced into the conditions of sale, that if one of the parties fails in making good his contract, if the purchaser fails in making good the purchase, the money that he has paid shall be forfeited; that, therefore, is introduced into the conditions of the first agreement between the parties, and the person advancing the money knows that he advances it on that condition, and knowing

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knowing that he advances it on that condition, if he does not perform all that it is incumbent upon him to perform, he has precluded himself by his original contract from recovering the deposits; but there is no such condition in these receipts. There is no such condition to which the Plaintiff in the present action has given his assent. It would be a strong thing, and contrary to justice, in my opinion, and that is the opinion of the whole Court, to say, that where that condition forms no condition in the original contract, it is a consequence which will follow the failure of the performance of all that the Plaintiff was bound to perform. Suppose him to have paid 99 *per cent.*, and to have failed in a day or a week to have paid the 1 *per cent.*; if that is the law, he must lose the whole 99 *per cent.*, merely because he has been guilty of a default of a single day or a single hour, — for the same rule which governs one case must govern the whole. Now that would be utterly inconsistent with justice. If the Defendant had said, I will take no advantage of your failure in not paying the instalments, the Plaintiff would have had no right to recover back his money: he would have had a right only to the certificates of the loan; but where the Defendant said, I will take advantage of your not paying the instalments, and will put an end to the agreement, at that instant the Plaintiff had a right to recover back the money he had paid. If the Defendant suffered any loss or inconvenience in consequence of the instalments not being paid, he would have a right by a cross-action to recover compensation for that inconvenience: but it would be mowing down rights, it would be going infinitely beyond that which the justice of the case requires, if we were to say that from a failure of any one of the conditions the party is precluded from any right to recover back the whole sum which he has advanced. Probably, if it had appeared upon the face of this

this special verdict that at the time the Plaintiff had tendered the principal and interest upon the instalments, and the Defendant refused to accept that tender, the stock receipts had been worth less than they were at the time the money was advanced, the jury might have been warranted in deducting that from the verdict. That was done in the case of *Dutch v. Warren*, and what was done in that case was confirmed in the subsequent case of *Moses v. M'Farlane*. (a) In *Dutch v. Warren* the original sum advanced was 200*l*. At the time the Defendant refused to transfer the shares in the mining company, the subscription, for which 200*l*. was paid, was only worth 172*l*., and Lord Chief Justice *King*, then Chief Justice of this Court, told the jury their measure of damages ought to be what the stock receipts were then actually worth, and for the 200*l*. to give only 172*l*. Lord *Mansfield*, in the case of *Moses v. M'Farlane*, observed, that the jury were properly directed to make that deduction; and he quotes a passage from the civil law which confirms the principle upon which the Lord Chief Justice of the Common Pleas had made that deduction in the case of *Dutch v. Warren*; which principle is this, "*quod conditio indebiti non datur ultra quam locupletior factus est qui accepit*." In this case the jury would have been warranted in doing it, but the jury have given the exact amount of the sum originally paid; we are, therefore, to conclude that the sum originally paid was that which the receipts were worth at the time of the tender of the balance and interest, and the refusal to comply with the request of the Plaintiff.

For these reasons, upon the first question, the Court are all of opinion, that the person who advanced the deposits has a right to recover them back under the circumstances which have taken place.

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Then comes the question, whether the Plaintiff in the present action can maintain an action for money had and received? It has been argued by Brother *Wilde*, that Defendant never undertook to pay *Lowe* the money, and therefore *Lowe* could not assign a right to the money, but to certificates of stock. It is undoubtedly true, that the Defendant never did undertake to pay *Lowe* money; he undertook to give him certificates of stock. But if *Lowe* could not have maintained an action to recover back the money on the express contract, yet on the Defendant's refusal to give the certificates of stock, there arises the implied contract to give back the money which had been paid for the purpose of obtaining the certificates. Now, if that right was in *Lowe*, if *Lowe's* right is transferred, or if the Defendant has assented to that which has been done, and has agreed to take the present Plaintiff as if he were *Lowe*, that right which *Lowe* had to recover back the deposits, upon the consideration failing, belongs to the Plaintiff. It is unnecessary for us to decide, whether these receipts, which purport to amount to a contract to deliver certificates to bearer, are transferable or not. We should do great mischief to the Defendant to hold that they were not; for who would lend money, who would advance money, upon such certificates as these, unless he could immediately transfer the certificates? The great object of the original subscribers is not to hold these certificates in their hands, and to become proprietors of foreign stock to the amount of the receipts which they purchase by paying the deposits, but the moment they have obtained the receipts they transfer them to others. If the law is, that these certificates are not transferable, there is an end to the negotiation of foreign loans in this country. Whether that is desirable or not, it is not for us to decide, and we shall leave that question probably undecided. We do not say whether the original receipts were transferable or not. The ground upon which

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which we put the Plaintiff's right to recover in this case is this, that whether the original receipts were transferable or not, the Defendant has treated the Plaintiff as the person holding these receipts, and has undertaken to consider him as the person who originally subscribed this money. We say that, first, from the circumstance of his giving out that the holder shall have the advantages of those receipts; next, from the advertisements by which he desired holders who wished to avail themselves of the advantage held out to them of the enlarged time for the payment of the balance, to send their receipts to him, and have them indorsed. These receipts were sent to him; he has indorsed them with the name of the Plaintiff, and by that indorsement, in a way much more certain and effectual than in any one of the cases to which we have been referred, he recognizes from that instant the right of the present Plaintiff as the owner of these deposits, and as having a claim to all the rights that might by any possibility grow out of the holding of these receipts. We do not, therefore, put the Plaintiff's right upon the transfer of the original receipts, or on the right acquired by any person who shall become the bearer, but on the subsequent conduct of this Defendant in acknowledging the Plaintiff as the person for whom he held the money, which renders this a much stronger case than any of those which have been referred to. The case of *Grant v. Vaughan*, was the case of a bill which was clearly negotiable. Up to that time it had been doubted whether those sort of bills were negotiable, but the Court of King's Bench then decided, that bills payable to bearer were negotiable: in that respect, therefore the case may be different from the present, because we do not affect to decide here whether the original instruments were negotiable or not; but these words of my Lord *Mansfield* in that case are extremely

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important: "Undoubtedly," said his Lordship, "an action for money had and received to the Plaintiff's use may be brought by a *bond fide* bearer of a note payable to bearer."

The Defendant in that case, in the strict sense of the words, held no money belonging to the bearer of that bill; but Lord *Mansfield* said, it could not be doubted, although the Defendant had done no act assenting to the right of the Plaintiff, that the Plaintiff might maintain an action for money had and received. So, in *Ward v. Evans*, where a creditor desired his debtor to pay his debt to a third person, and the debtor assented, it was holden the third person might maintain an action against the debtor for money had and received, though there the Defendant held no money of the Plaintiff; a circumstance of which Mr. Justice *Yates*, in the case of *Grant v. Vaughan*, in referring to *Ward v. Evans*, expressly takes notice. *Wilson v. Coupland* and *De Bernales v. Fuller* were cases upon this principle; but in *Fenner v. Meares*,—which decided principally, that a bond is not assignable,—where a man had indorsed upon a bond that he would pay to any body that should become the holder of that bond, the Court of Common Pleas held, that though the person who had become the holder by assignment could not maintain an action merely by suing on the bond, he might by virtue of that indorsement bring an action for money had and received against the obligor. If, then, he could bring an action for money had and received against the obligor, surely in the present case, if we stood only on the first advertisement, in which this Defendant says I will pay to bearer, we must be of opinion, that the Plaintiff has a right to recover in this form of action.

I wish to mention one circumstance, because if this case is carried further, it may be thought it has not occurred

occurred to any one of us. Whoever looks into the law may find it very doubtful, whether any person holding allegiance to the king of this country can, without the king's consent, borrow money or lend money to a foreign prince. No question of that sort has been raised in the argument, and we give no opinion upon it.

For these reasons we are of opinion, that the judgment upon the special verdict must be for the Plaintiff.

Judgment for Plaintiff accordingly.

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July 3.

THIS was an action in debt for use and occupation, with the usual money counts.

Plea, *nil debet*.

At the sittings at Guildhall, after *Hilary* term, before *Best* C. J., a verdict was directed to be entered for the Plaintiff for 120*l.*, with leave for the Defendant to move to enter a nonsuit on several points reserved. The opinion of the Court was subsequently taken on the following case:

In *Easter* term, 1815, the Plaintiff recovered a judgment against *Richard Estcourt Cresswell* on a warrant of attorney, given by him to the Plaintiff, for 10,000*l.*

Devise to and to the use of *M. J.* for life; then to and to the use of *L. D.* and *T. E.* and their heirs, in trust for *R. E. C.* for life, with a declaration that the estates were so limited, and the legal estates vested in the trustees to support

contingent estates and limitations, subsequent to the estate to *M. J.*

The trustees, prior to an *elegit* sued out against *R. E. C.* and executed on the property, but subsequently to the judgment, conveyed the property to another trustee, in trust for *R. E. C.* and certain of his creditors:

Held, that *R. E. C.*'s interest could not be taken under this *elegit*, as the legal estate was in the trustees at the time of the judgment, and *R. E. C.* had not a sole equitable estate at the time of the execution.

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debt and 80s. costs; and in *Hilary* term, 1826, the judgment was revived by *scire facias*. On the 18th of April 1826, the Plaintiff issued a writ of *elegit*, on the judgment, directed to the sheriff of *Shropshire*, returnable on the morrow of the *Ascension* then next, on which day the sheriff returned an inquisition, which found that *R. E. Cresswell* was seised in fee of certain premises described in the inquisition, consisting of several messuages and farms. That certain messuages and land, called *Wall Furlong Farm* and *Pickthorn Farm*, in the occupation of *W. Pugh*, and *Brook Farm* and *Sedbury Hall Farm*, in the occupation of *J. Pugh*, were a true and equal moiety of the lands and tenements whereof the said *R. E. Cresswell* was seised as aforesaid, which moiety the sheriff, on the day of taking that inquisition, had delivered to *Caroline Harris*, in the said writ named, to hold the said moiety of the said messuages, lands, tenements, and premises to the said *C. Harris* and her assigns, as her freehold, according to the form of the statute, until the debt and damages in the writ mentioned should be thereof fully levied.

The premises mentioned in the inquisition as being in the tenure and occupation of the Defendant *J. Pugh*, were those for the use and occupation of which this action was brought.

It was proved, that he had been served with a notice of the Plaintiff's claim; had been required to pay his rent to the Plaintiff; and had upon that occasion said, that *R. E. Cresswell* was his landlord, and that he had paid him 240*l.* a year for rent.

On the part of the Defendant, it appeared that *Thomas Estcourt Cresswell*, being seised in fee of the premises in question, by his will, dated the 14th of *January* 1786, and duly executed and attested, gave, and devised "unto and to the use of *Mary Jenkins* and her assigns, for her natural life, all his messuages, lands, tenements,

tenements, and hereditaments whatsoever, situate at *Sedbury* and *Stoteston*, or elsewhere in the county of *Salop*, charged nevertheless with the payment of one annuity or yearly rent-charge of 100*l.*, to be payable out of the same, without any deduction, unto *W. Jenkins*, during the term of the natural life of *Mary Jenkins*." The will contained the usual powers of entry and distress in case of non-payment of the annuity; and another charge of 200*l.* on the same premises, in favour of *William* and *John Dewell*, during the life of *Elizabeth Dewell*, with similar powers of entry and distress; and subject to and charged with the said annuity of 200*l.*, and the several powers and remedies for recovering the same, the testator gave and devised the same premises "unto and to the use of the Right Honourable *Francis Lord Ducie*, and *Thomas Estcourt*, Esq., their heirs and assigns, upon the trusts nevertheless therein-after expressed and declared of and concerning the same viz. in trust for the said *W. Jenkins* and his assigns for the term of his natural life; and from and after the death of *W. Jenkins*, subject to and charged with the said annuity or rent-charge of 200*l.*, and to the several powers and remedies for recovery thereof, in trust for *Richard Estcourt Cresswell*, the first son of his (the said testator's) son *Estcourt Cresswell* and his assigns, for the term of his natural life; and from and after the decease of *R. E. Cresswell*, in trust for the first son of the body of the said *R. E. Cresswell* lawfully to be begotten, and the heirs male of the body of such first son; and in default of such issue, to the second and other sons in tail male," with divers remainders over, and the ultimate remainder to his own right heirs for ever. The will contained also the following declaration: "And I do hereby declare, that I have so limited my said estates at *Sedbury* and *Stoteston* aforesaid to the use of the said

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Francis Lord Ducie and Thomas Estcourt, and their heirs, in remainder expectant on the limitation to the said *M. Jenkins* and *W. Jenkins* as aforesaid, to the end and intent that the legal estate so vested in them, my trustees and their heirs, may preserve and support the several contingent limitations and estates, subsequent to the estate limited thereof in trust for the said *W. Jenkins*." And the testator further directed, that "in case any interval of time should happen between the determination of the said estate so limited in trust for the said *W. Jenkins*, by the death of *R. E. Cresswell*, *Sackville Cresswell*, and *Barbara Cresswell*, without issue male of his, her, and their body and bodies, and the birth of any other son, or daughter of his said son *Estcourt Cresswell* lawfully to be begotten, the trustees of his said estate for the time being should permit his son *Estcourt Cresswell* to receive the rents and profits of the said messuages, lands, and premises during such interval or intervals, subject to and after payment of the said annuity of 200*L.*, thereinbefore charged upon the same hereditaments." The will contained also the following provision: "Provided, and it is my will, that no part of my personal estate shall be in anywise liable to the payment of any part of the annuities charged on my said real estates, but that such annuities, and every part of each of them, shall from time to time be paid and discharged out of the rents and profits of the said real estates upon and out of which the same are charged and made payable, and not otherwise."

The premises so devised included those for the use and occupation of which this action was brought.

The testator died in the year 1788, without having altered or revoked his will, except as to some personal property, leaving *Mary Jenkins*, *William Jenkins*, and his grandson, *Richard Estcourt Cresswell*, him surviving.

William Jenkins died in April 1823; *Elizabeth Dewell*

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is still living; but *Mary Jenkins*, who (after the testator's death) married Mr. *William Long*, died in *January 1822*; Lord *Ducie* died in *August 1808*, and *Thomas Estcourt* in *December 1818*, intestate as to any estates vested in him in trust, leaving *Thomas Grimstone Bucknall Estcourt* his eldest son and heir at law.

The Defendant also put in indentures of lease and release, bearing date the 6th and 7th of *May 1825*, the latter made between the said *Richard Estcourt Cresswell*; of the first part; *Richard Estcourt Cresswell*, eldest son of the said *Richard Estcourt Cresswell*, of the second part; *Thomas Lys*, of the third part; and *William Carr Foster*, of the fourth part; being a deed to make a tenant to the *præcipe* for suffering a common recovery, whereby the said messuages, land, tenements, and hereditaments were conveyed, settled, limited, and assured "to the use of such person or persons, for such estate or estates, and for such interest or interests, in such parts, shares, and proportions, and upon such trusts and for such ends, intents, and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, and subject to such powers of revocation and of new appointment, and other powers, provisoes, conditions, restrictions, limitations, declarations, and agreements, as the said *Richard Estcourt Cresswell* the elder, and *Richard Estcourt Cresswell* the younger, at any time or times and from time to time, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by them respectively, in the presence of and attested by two or more credible witnesses, should jointly direct, limit, or appoint; and in default thereof, to the use of the said *Richard Estcourt Cresswell* the elder, and his assigns for his life," with divers remainders over.

A recovery, pursuant to the last deed, was duly suffered in *Easter term, 1825*.

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Defendant also put in certain indentures dated the 30th and 31st of December 1825, and made between the said *Richard Estcourt Cresswell* the elder, and *Richard Estcourt Cresswell* the younger, of the first part; the said *Thomas Grimstone Bucknall Estcourt*, of the second part; the Reverend *Thomas Tracy Corwell* and *Edward Corwell* Esquire, of the third part; whereby, after reciting (amongst other things) the said indentures of the 6th and 7th May 1825, and that "the said *Richard Estcourt Cresswell* the elder was indebted to several persons in divers sums of money to a considerable amount, which he was unable to pay and satisfy, and some of which had been incurred on behalf of his son, and that he had relinquished his life interest in 29,609*l.* 5*s.* 11*d.* $\frac{3}{4}$ per cent. consolidated bank annuities, for the benefit of *Richard Estcourt Cresswell* the younger, in order to make an immediate provision for him, as he did thereby acknowledge; and that for the purpose of raising a fund for the payment of the debts of the said *Richard Estcourt Cresswell* the elder, and in consideration of the provision made by him for his said son, and in order to make some further provision for their mutual benefit, they were desirous of vesting the said estates in the said *Thomas Tracy Corwell* and *Edward Corwell*, their heirs and assigns, upon the trusts and for the ends, intents, and purposes thereafter declared concerning the same; and with that view they had agreed to make the appointment thereafter contained: And reciting that it was apprehended, that the legal estate of inheritance in fee simple in remainder in the said estates and hereditaments devised by the before recited will, expectant upon and subject to the estate for life of *Mary Long*, became vested in the said *Francis Lord Ducie* and *Thomas Estcourt* under the same will, and certain indentures of lease and release, of the 27th and 28th November 1789; and that upon the decease of the

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the said *Mary Long*, the legal estate in fee simple in possession of and in the same estates became and was then vested in the said *T. G. B. Estcourt*, as such heir at law of the said *Thomas Estcourt*; and that he had agreed to make the conveyance thereafter contained, in order to pass the legal estate of the said hereditaments so vested in him, they the said *Richard Estcourt Cresswell* the elder, and *Richard Estcourt Cresswell* the younger, pursuant to and in exercise and execution of the power or authority given, limited, or reserved to them jointly by the said indentures of the 6th and 17th May 1825, and common recovery suffered pursuant thereto, did, in manner therein mentioned, jointly direct, limit, and appoint, that all the said hereditaments should thenceforth go, remain, and be, and that the said indentures and recovery should respectively operate and enure, and that all persons seised thereof, and their heirs, should thenceforth stand and be seised of the same hereditaments and premises, to the use of the said *Thomas Tracy Corwell* and *Edward Corwell*, their heirs and assigns for ever, upon the trusts and for the ends, intents, and purposes thereafter expressed and declared, or referred to concerning the same; and it was farther witnessed, that the said *T. G. B. Estcourt*, according to his estate and interest in the premises, and as far as he could or ought to do by the direction of the said *Richard Estcourt Cresswell* the elder, and *Richard Estcourt Cresswell* the younger, did bargain, sell, and release unto the said *Thomas Tracy Corwell* and *Edward Corwell*, their heirs and assigns for ever, (in their actual possession being, by virtue of the said lease,) all the said hereditaments and premises called *Sedbury Hall Farm* and *Brook Farm*, (being the premises for the use and occupation of which this action was brought,) to hold the same premises unto the said *Thomas Tracy Corwell* and *Edward Corwell*, their heirs and assigns for ever,

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ever, to the use of the said *Thomas Tracy Coxwell* and *Edward Coxwell*, their heirs and assigns for ever, with a declaration that the said estate and premises were appointed and released to the said *Thomas Tracy Coxwell* and *Edward Coxwell*, their heirs and assigns, upon trust that they, or the survivor of them, or the heirs or assigns of such survivor, did and should, as soon as conveniently might be after the execution of those presents, of their or his own authority, and without any further consent or concurrence of the said *Richard Estcourt Cresswell* the elder and *Richard Estcourt Cresswell* the younger, or either of them, their, or either of their heirs, make sale and absolutely dispose of the same premises in manner therein mentioned; and upon trust out of the money to arise from such sale, and by the rents in the mean time, to pay all the costs in carrying into effect such trusts; and, in the next place, to pay, satisfy, redeem, and discharge the several charges and incumbrances, if any, then affecting the said trust estates and premises by way of mortgage, annuity, or otherwise howsoever; and after making the several payments and deductions, should pay and apply all, or a competent part, of the residue of the said trust monies towards payment and satisfaction of the several debts and sums of money then due and owing from the said *Richard Estcourt Cresswell* the elder, in such order and manner as the said trustees should in their discretion think proper; and should stand possessed of the ultimate residue (if any) upon such trust and for such purposes as were expressed in an indenture intended to bear even date therewith, and to be made between the said *Richard Estcourt Cresswell* the elder, of the first part, *Richard Estcourt Cresswell* the younger, of the second part, and the said *Thomas Tracy Coxwell* and *Edward Coxwell*, of the third part, with further declarations, that the person purchasing such estate should not be answerable
for

for the loss or misapplication of the purchase money, and that the receipts of the trustees be good discharges."

It was objected, on the part of the Defendant, that *Richard Estcourt Cresswell* was never seised of the legal estate, but that, upon *Mrs. Long's* death, the legal estate vested in *T. G. B. Estcourt*, as the heir at law of the surviving trustee under the will of *T. E. Cresswell*, and that *R. E. Cresswell* had no trust estate extendible under the statute of 29 C. 2. c. 3. s. 10., the deeds of the 30th and 31st of *December 1825* having created trusts for other persons, and not for *R. E. Cresswell* solely; that the inquisition was void for not setting out the lands with sufficient certainty, and not properly returning the seisin of said *R. E. Cresswell*; and that as no proof was given that the Defendant had ever paid any rent to *R. E. Cresswell*, or to any person for his use, and as no attornment was made by Defendant to the tenant by *degit*, the action would not lie. But the Lord Chief Justice reserved these points, and directed the jury to find a verdict for the Plaintiff, with liberty to move to enter a nonsuit.

The question for the opinion of the Court was, whether the Plaintiff was entitled to recover? If the Court should be of opinion that the Plaintiff was entitled to recover, the verdict was to stand, otherwise a nonsuit to be entered.

The case was argued by *Taddy Serjt.* for the Plaintiff, and *Wilde Serjt.* for the Defendant. The three points were debated at great length; 1st., whether the inquisition were valid; 2d., whether this action of use and occupation would lie for the Plaintiff till the Defendant had attorned; 3d., whether *R. E. Cresswell* had any extendible property in the land occupied by the Defendant. As the judgment was confined to this latter point, the arguments on the other two are omitted.

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On the part of the Plaintiff, it was argued, that it was not necessary for her to establish *R. E. Cresswell's* title, or even to shew what it was; that she was entitled by the writ of *elegit* to a moiety of *R. E. C.*'s rents, and when the Defendant admitted rent to be due from him to *R. E. C.*, he admitted the validity of the Plaintiff's claim. If, however, it should be esteemed necessary to show the estate of *R. E. C.*, he took the legal estate in the land in question under the will of his father *T. E. C.* The trustees under that will took a use, subject to be executed in the various devisees, as occasion should arise. They were not required to do any thing which would make it necessary for them to have the legal estate; and in the absence of such necessity, the law always favoured the beneficial owner. But admitting *R. E. C.* to have taken only an equitable estate, it was extendible under this *elegit*. The trustees had never taken possession, as in *Hunt v. Coles (a)*, and the statute 29 *Car. 2. c. 3.* enables the judgment creditor to take trust property to which the debtor is beneficially entitled at the time of the execution; and though there was, in the present instance, a conveyance in 1825, yet as that conveyance was voluntary, tending to destroy the priority of judgment creditors, and to defeat the distribution ordered by the law, it was void under the statute of *Eliz. c. 13. s. 5.*

Wilde contra. Whether *R. E. C.* took a legal or an equitable estate must depend on the intention of the deviser, to be collected from the language of the devise; *Harton v. Harton (b)*; but of that intention no doubt can remain when he declares "that he has so limited his estate to the use of Lord *Ducie* and *G. B. Estcourt*, to the end that the legal estate so vested in them might preserve the contingent remainders."

(a) 1 *Comyn*, 226.(b) 7 *T. R.* 652.

The property, too, being limited unto and to the use of the trustees and their heirs, in trust for others, the use was vested in the trustees, according to the invariable construction of the statute of uses. *Hopkins v. Hopkins* (a), *Boteler v. Allington* (b), *Doe v. Martin* (c). *R. E. C.*, therefore, took only an equitable interest under the will, and that interest he had *bona fide* parted with before the issuing of the execution. The conveyance by which he effected this, being for the benefit of creditors, was rather in furtherance of, than in opposition to, the law. But even if that conveyance should not be deemed a sufficient transfer as against this execution, yet the trust estate which *R. E. C.* had, being one of which *R. E. C.* was not possessed singly, but connected with other persons, viz., the creditors, it was not an interest that could be taken under an *elegit*. *Doe d. Hull v. Greenhill* (d), *Harris v. Booker* (e).

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The judgment of the Court was now pronounced by Best C. J., who, after reading the case as above stated, proceeded, — If *Richard Estcourt Cresswell* had a legal estate in the premises at the time of the judgment, it would have been bound by the judgment, and the conveyance in 1825 would not have prevented it from being taken by the *elegit* issued against him. But if the legal estate was in the trustees, Lord *Ducie*, and *Thomas Estcourt*, and *Richard Estcourt Cresswell* had only an equitable interest, the conveyance by the trustees before the suing out of the execution exempts the property from any liability to that execution; for the stat. 29 Car. 2.

(a) 1 Atk. 581.

(b) 1 Bro. Rep. 72. See also 1 Cruise, 413, and *Whitstone v. Sis. Bury*, 2 P. Wms. 147.

(c) 4 T. R. 39.

(d) 4 B. & A. 684.

(e) 4 Bingb. 96.

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s. 18. a. 10, which makes lands liable to judgments against a *cestuique* trust, only authorises the sheriff to take such as the trustees are seised of at the "time of the execution sued." So that, while a judgment binds the *legal* estate of a party from the time it is signed, it only affects such trust property as he is possessed of at the *time of execution sued*. This has already been determined in *Hunt v. Coles*. In that case, *Benjamin Stock* was seised in fee of certain lands in question, and by indenture of *October 1682*, conveyed them, in consideration of *1270l.*, to *Henry Soursby* and his heirs, who was only a trustee for *Peter Chamberlain* and his wife, and their heirs. By indenture of *December 1682*, between the said *Henry Soursby* of the one part, and the said *Peter Chamberlain* and his wife, and *Hope Chamberlain*, their son, on the other part, it was agreed that *H. Soursby* should stand seised of the premises, to the intent that *P. Chamberlain* and *Ann* his wife should take *40l.* a year for their lives, and that the rest of the profits should be paid to *Hope Chamberlain* and the heirs of his body. In *1695* *James Boardman*, lessor of the Plaintiff, recovered judgment against *Hope Chamberlain* for a debt of *160l.* In *July 1699*, *Ann Chamberlain* and the said *Hope Chamberlain* borrowed *600l.* of the Defendant *Coles*, and for a security for that sum the said *H. Soursby*, by their direction, mortgaged the premises to the said *Coles* for *500* years. In *1714*, the lessor of the Plaintiff obtained judgment on a *scire facias* upon the first judgment, and upon this took out execution by *elegit*; and the sheriff, after an inquisition, which found that *Hope Chamberlain* was seised in fee, extended one moiety, and delivered it to the lessor of the Plaintiff; and the doubt was, if he had any title by the statute *29 Car. 2. c. 3.*, by which it is enacted, that it shall be lawful for every sheriff, &c. to whom writs shall be directed on judgment, &c., to deliver execution to the Plaintiff of all such lands, &c. as any

any other person shall be seised, &c., in trust for him, against whom execution is sued, like as he might have done if the said Defendant had been seised of such lands of such estate as they shall be seised of, in trust for him at the time of the said execution sued. And it was determined by *Tracy J.* that the execution was not good; for the words at *the time of the said execution sued*, refer to the seisin of the trustee; and, therefore, if the trustee has conveyed the lands before execution sued, though he was seised in trust for the Defendant at the time of the judgment, the lands cannot be taken in execution. That, therefore, brings us to the question, whether *Richard Estcourt Cresswell* had the legal or equitable estate in these premises? But it was clearly the intention of the testator, that he should take only an equitable estate; and this may be collected from the terms of the devises to *Mary Jenkins* and to *Richard Estcourt Cresswell*. The property is devised "unto and to the use of *Mary Jenkins*, and her assigns for life." But when *R. E. Cresswell* comes in question, the devise is "unto and to the use of Lord *Ducie* and *Thomas Estcourt* and their heirs," in trust for *R. E. Cresswell* for life; and then there is the testator's express declaration that he had so limited his estates to Lord *Ducie* and *Thomas Estcourt* and their heirs, to the end and intent that the *legal estate so vested in them* might support the contingent limitations and estates, subsequent to the estate limited in trust to *W. Jenkins*. The use, therefore, was executed in the trustees, and all the subsequent estates were holden in trust. It is too late now to shake the position, that where more than one use is declared, the first alone is executed under the statute. *Tyrrell v. Tyrrell* (a) is a decision expressly in point; and the same rule is laid down

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(a) *Dyer*, 153.

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in *Whetstone v. Sts. Bury* and *Marwood v. Darrel*. (a)
The devise in these cases was "to the trustees and their heirs, to hold to the use of themselves and their heirs, to and for the only proper use and behoof of A. B." And Lord *Hardwicke* said in the latter, "I am clearly of opinion that it is only to the use of the trustees, and that they have a legal estate, and whoever else takes under this devise, takes only as *cestuique* trust."

It is impossible to distinguish that case from the present, and it is therefore unnecessary to decide either of the other points which have been argued. *Richard Estcourt Cresswell* having had only an equitable estate, and the trustee having conveyed away the property before the execution was sued, the rule for a nonsuit must be made

Absolute.

(a) *Cas. temp. Hardw.* 91.

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A lessor, whose property has been assigned to a provisional assignee under the insolvent debtor's act, cannot eject an occupier of land which passed under the assignment, although the provisional assignee has

never taken possession, nor any permanent assignee been appointed, nor the rent ever been withheld from the lessor. *Best C. J. dissentiente.*

GASELEE J. This was an action of ejectment to recover the possession of certain premises, which the lessor of the Plaintiff, who was himself tenant from year to year, with an agreement for a lease, had demised to Defendant as tenant from year to year.

The lessor of the Plaintiff, on the 21st March 1826, gave the Defendant notice to quit at *Michaelmas*, which was the period of the year at which he had originally entered, and the demise was laid after the expiration of such notice.

Pending

Pending the tenancy, and before the giving of the notice to quit, the lessor of the Plaintiff had taken the benefit of the insolvent act, and had been discharged under it.

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His application to that court was made in the month of *January* 1825, and on the 25th of that month he executed the usual assignment to the provisional assignee.

The provisional assignee never took possession of the premises, nor did it appear that he knew any thing about them.

No subsequent assignee has been appointed, and the rent has always been paid to the lessor of the Plaintiff.

At the trial of the cause it was insisted by the Defendant that the lessor of the Plaintiff could not recover, but that the title was in the provisional assignee of the Insolvent Debtors' Court. The Lord Chief Justice, however, overruled the objection, and the jury found a verdict for the Plaintiff.

The case now comes before the Court on a motion to set aside that verdict and grant a new trial.

The Defendant rests his objection to the lessor of the Plaintiff's right to recover the possession of these premises upon the fourth section of 1 G. 4. c. 119., which enacts, that every prisoner applying for his discharge according to the provisions of that act, shall, at the time of subscribing his petition, duly execute a conveyance and assignment, in such manner and form as the Court shall direct, of all the estate, right, title, and interest of such prisoner, to all the *real and personal estate and effects of every such prisoner*, except to the wearing apparel, bedding, and other such necessities of such prisoner, and his or her family, not exceeding in the whole the value of 20*l.*, so as to vest *all such real and personal estate and effects in the provisional assignee of the said Court*, subject to a proviso that in case such

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prisoner shall not obtain his discharge by virtue of that act, such conveyance and assignment shall, from and after the dismissal of the petition of such prisoner praying for his discharge, be null and void to all intents and purposes.

The lessor of the Plaintiff, on the other hand, contends, that inasmuch as the provisional assignee has never done any act to shew his acceptance of the insolvent's estate in these premises, the title still remains in the insolvent; and that he may, therefore, maintain the ejectment. And in support of this position he relies on the cases of *Turner v. Richardson (a)*, *Copeland v. Stephens (b)*, and *Lindsey v. Lambert*, not yet reported, but which came on in this Court in *Hilary* term last.

The first of these cases was an action for rent, brought by the lessor against the assignee of the lessee, which lessee had become bankrupt; and the Plaintiff alleged that all the title, &c. of the bankrupt had come to the assignee; but it appearing that although the assignee had advertised the premises for sale, and put them up, &c., yet as a sufficient offer had not been made for the premises, the assignee had in consequence thereof renounced the premises, — it was held that the Defendant could not be considered as having done sufficient to take upon himself the character of assignee, so as to render himself responsible for the performance of the covenants.

In the last case of *Lindsey v. Lambert*, the same thing was held with respect to the assignee of an insolvent debtor.

There is, however, one difference between these cases and that now before the Court, which if there had been no decision carrying the matter farther, I should have considered so essential as to have prevented them from

(a) 7 East, 335.

(b) 1 B. & A. 593.

at all bearing upon it, viz. that in those cases it was sought to charge the Defendant with the payment of rent, and there had been an actual repudiation of the estate.

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But in the case of *Copeland v. Stephens* neither of these circumstances occurred: the action was not brought against the assignee, nor had he repudiated the estate; and that case was determined upon the broad principle that the estate did not pass to the assignee, unless he did something to signify his acceptance of the term.

There still, however, appears to me to be a material difference between the present case and those on which the Defendant relies, to prevent this case from being governed by those, and to bar the lessor of the Plaintiff from recovering.

The most material one arises from the words of the insolvent act, which I have above stated, and which requires such an assignment as shall *vest* the estate in the provisional assignee, and which assignment is to be and in this case was made at the time of subscribing the petition.

Under the bankrupt act the commissioners take *no* estate. They have barely a power, and until the execution of that power the estate remains in the bankrupt.

Under the insolvent act the object appears to be to divest the insolvent of all the estate before his petition can be entertained. Under the bankrupt act the bankrupt does nothing. Under the insolvent act the debtor himself makes the assignment. It cannot, therefore, lie in his mouth to say the estate does not pass under it, except in the event of his not obtaining his discharge; in which case the assignment, by the express provisions of the act, is declared to be void.

The provisions of the seventh section of the 1 G. 4. c. 119. that no suit in law be proceeded in further than an

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arrest on mesne process, or suit in equity be commenced by any assignee or assignees of any such prisoner's estate and effects, without the consent of the major part in value of the creditors, unless with the approbation of one of the commissioners of the Court,—and in 3 G. 4. c. 123. s. 1. that it shall be lawful for the provisional assignee to sell, &c. if *the Court shall so order*,—have been urged as grounds to shew that the property is not absolutely vested in the provisional assignee.

It has, however, been determined in this Court, in the case of *Doe d. Clarke v. Spencer (a)*, not only that the provisional assignee may, without application to the Insolvent Court, maintain ejectment for the property assigned, but also that this Court will not stay his proceedings, although he has not the authority of this Court, or of the creditors, to proceed.

It may, indeed, be said, that in that case the provisional assignee taking upon himself to sue is a proof of his acceptance; but still it appears to me to be material to refer to that case on account of what is said by my Lord Chief Justice as to the vesting of the estate.

He says it does appear from the 1 G. 4. c. 119. and 3 G. 4. c. 123. that the real estate is completely *vested* in the provisional assignee by the assignment made to him, and remains until it is divested by his assignment to the assignees named by the Court, and those assignees having accepted such assignment.

Speaking of the 4th section,—that for the insolvent's making an assignment to *vest* all his real and personal estate in the provisional assignee,—he says, the object of this section “was to prevent the estate of the insolvent from being wasted between the time of his applying for relief, and the Court of Insolvent Debtor's declaring that he is entitled to it. This object would be defeated if the

(a) 3 Bingham. 203. 370.

provisional assignee could not maintain an action for the recovery of the insolvent's property."

To this I would add, that the object would be equally defeated if, where the provisional assignee was ignorant of the existence of any particular property, and, therefore, took no notice respecting it, the insolvent debtor might step in and recover it, and apply it to his own purposes.

It appears to me, too, to be necessary that property of this description should be vested in the provisional assignee, for the purpose of enabling the subsequent assignee to ascertain, whether it is a *damnosa hereditas* or not; and to exercise his discretion whether he would accept it or not. For what is to be assigned to the subsequent assignee? Not generally all the property of the insolvent, but only such as shall have been *vested* in provisional assignee.

The words of the 7th section of 1 G. 4. c. 119. are, that when the said Court shall adjudge any person to be entitled to his discharge, such Court shall appoint a proper person or persons to be assignee or assignees of the estate and effects of such prisoner for the purposes of this act, and when such assignee or assignees shall have signified to the said Court their acceptance of the said appointment, every such prisoner's estate, effects, rights, and powers *vested* in such provisional assignee as aforesaid, shall immediately be assigned by such provisional assignee to such assignee or assignees.

Nothing, therefore, is to be assigned to the new assignee, but what has been previously vested in the provisional assignee. But it is said that it will be very hard that the insolvent shall continue liable to the lessor, and yet not be able to maintain an action against his lessee.

This, however, is the case with every lessee who

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remains liable to the lessor during the whole term, notwithstanding any number of assignments, and who in case of bankruptcy was not protected against the lessor, whether the assignees accepted or not, until the 49th of the late King; and the hardships may be put an end to by an application to the Insolvent's Court to direct the provisional assignee to re-assign, if the assignee in chief will not accept the term. The point, however, does not now come before the Court for the first time; for in the case of *Crofts v. Pick* (a), which was an action of replevin, the defendant avowed for rent in arrear. The plaintiff pleaded, that the defendant had taken the benefit of the insolvent act, and that the messuages and premises on which the distress had been levied, as well as all his other property, had been duly assigned and conveyed to one *Joseph Jeyes*, as a provisional assignee for the benefit of the creditors.

The defendant replied, that *Jeyes* did not consent to accept the plaintiff's right and title in said messuage and premises; on which issue was joined. At the trial, *Jeyes*, on being called as a witness, proved that he had consented to take on himself the office of a provisional assignee, and that he had accepted the conveyance of plaintiff's property as such assignee; but that he was unacquainted with the nature of the premises in question, and that he merely held a general conveyance of the plaintiff's property in his capacity of provisional assignee.

The Court were of opinion that a public officer, by accepting a trust, is bound to do all acts connected with such trust in his capacity as such public officer, and, therefore, that a provisional assignee duly appointed by the Insolvent Debtor's Court had no right to exercise a

(a) 3 *Moore*, 384. 1 *Bingb.* 354.

discretion;

discretion; and as he could not refuse taking the assignment, he must be taken to have consented to accept the property so assigned to him.

That case did not arise upon the present insolvent debtor's act, but upon the 53 G. 3. c. 102., which was more favourable than this to the construction contended for by the lessor of the Plaintiff; for it directed that the property should be vested in the person or persons to whom the same should, by order of the Court, be conveyed, in case such person or persons should consent to accept the same.

In the present case the words of the act are absolute.

Before I quit this part of the case, I would refer to an authority not exactly similar to the present, but recognizing a distinction between a bankrupt and an insolvent. In *Shee v. Hale* (a), after a devise to trustees to pay to testator's son an annuity during his life, or until such time as he should actually sign any instrument whereby he should contract or agree to sell a lease, or otherwise part with the same, the son took the benefit of an insolvent act, and inserted the annuity in his schedule:

The Master of the Rolls: "It appears to me that the son has done an act within this will, to authorize or empower others to receive this annuity. This differs from the case of the bankrupt; the bankrupt had not done any thing. The insolvent debtor was not in a situation to be compelled to part with this annuity. He might have enjoyed it for his life. The signing the petition and schedule appear to me to be clear acts; there can be no doubt of the intention." This is referred to in *3 Merivale*, 184.

Here the insolvent has executed the assignment, and by his own act has divested himself of the property.

(a) 13 Ves. 404.

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It does not appear to me, therefore, that he can say it now belongs to him, and is not vested in the party to whom he has assigned it.

Another ground of objection taken by the lessor of the Plaintiff is, that the Defendant having held under him is estopped from disputing his title; and in support of this objection is cited the case of *Balls v. Westwood* (a); but it appears that the case of *England on the demise of Syburn v. Slade* (b) is a decisive answer to this objection.

In that case it was held, that in an ejectment by landlord against tenant, the tenant may shew that the landlord's title has expired, and that he has no right to turn him out of possession, although he cannot be permitted to prove that the landlord never had any title. *A fortiori*, may this be where the extinction of the landlord's title is occasioned by his own act as in this case, by his assignment of the reversion to another.

It will not be denied, that to an action for rent, assignment of the reversion to another is a good plea: were it otherwise, every landlord who had sold his estate to a purchaser might still maintain an action against the tenant for the subsequent rent.

For these reasons, I am of opinion that the lessor of the Plaintiff has no title to recover, and, consequently, that the rule for setting aside the verdict and granting a new trial must be made absolute.

BURROUGH J. *Palmer* the lessor of the Plaintiff, a debtor in execution, to *regain* his liberty, and *get discharged* from his debts, has, under the authority of the insolvent acts, assigned and conveyed *all* his estate and interest in the premises in question to the *provisional* assignee appointed by the Court of Insolvent Debtors. Yet he contends, that at the time of making the demise

(a) 2 Camp. 11.

(b) 4 T. R. 682.

stated

stated in the declaration, and at the time of commencing this action, he had a *legal estate* in him in the *same premises*.

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A lessor of the Plaintiff in ejectment must recover on the strength of his own title. He cannot recover unless he can prove that the demise is of a legal estate for a term; such term can only be created when the lessor has a *legal estate* in him sufficient to enable him to make such demise.

I am of opinion that the lessor of the Plaintiff in this case has no estate whatever. That his estate and interest passed by his conveyance may be demonstrated by a short review of the insolvent acts.

I would, in the first place, repeat, that the *provisional assignee*, by the conveyance, takes the premises assigned *in trust* for the benefit of the creditors of the insolvent, but subject to the direction and order of the insolvent debtor's court; and that the only circumstance which renders the assignment and conveyance to him void, is in case the *debtor* does not obtain his *discharge*.

The lessor of the Plaintiff has obtained his discharge.

It is a clear rule of law, that all acts of parliament made in *pari materia*, with that on which the question arises, may be used in construction.

It cannot be denied that the *Lords' act* is an act of this kind; it is a standing insolvent act, limited to the amount of the debt for which the debtor stands charged in execution.

This act, the 32 G. 2. c. 28., contains two distinct and separate enactments, one for the relief of the debtor, the other for the relief of the creditors. The fifteenth section of this statute provides, that if any debtor in execution for a debt not exceeding 100*l.*, is minded to deliver up *all his estate and effects* towards the satisfaction of his debts, *he* may exhibit a petition to the Court in which the action is, and he is required to deliver in an account, upon

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upon oath, of all his *real and personal* estate, and all his *deeds, evidences, &c.*, and being brought into court, the Court may order, that by a short indorsement on the back of his petition to be signed by him, *he shall assign and convey* to the creditor or creditors who shall have charged him in execution, all his messuages, lands, and tenements, &c. And the act expressly states, that the estate, interest, and property of all messuages, lands, goods, estate, and effects which shall belong to such debtor shall, by such *conveyance and assignment*, be vested in the person to whom such conveyance shall be made, according to the estate and interest such debtor had therein.

The second provision in the *Lords' act* is by s. 16., and it demonstrates the effect of this conveyance so as to leave no room for doubt.

By this sixteenth section it is enacted, that if a debtor will rather spend his substance in gaol, than discover and deliver it up to his creditors, then a creditor who may have him in execution may compel him at the time and in the manner provided by the act to be brought before the Court, and the debtor is required, on his oath, to deliver a true account in writing of the whole of his real and personal estate.

Then observe for what purpose this is to be done. It is expressly said to be, "*in order that the estate and effects of such debtor may be DEVESTED out of him the debtor;*" and he is, by s. 17., to assign and convey to such person or persons as the Court shall appoint, all his estate and effects, &c.

The parliament uses the words, "*in order that the estate and effects may be divested out of him,*" *ex abundanti cautela*; the conveyance and assignment produce the effect of divesting, and not those words; which are only explanatory of the purpose of the assignment and of the meaning of the statute.

This

This act was followed by others which extended the relief to debtors to larger amounts than 100*l.*, and by a variety of insolvent acts made from time to time, till the time of his present Majesty, when by an act made in the first year of his reign, a court of record for the relief of insolvent debtors was established.

A new order of things is prescribed by this act. The Court is empowered to appoint a provisional assignee. Section 4. provides for the mode of the debtor's application substantially in the same manner as in the Lords' act. He is to sign his petition, and at the time of subscribing it he is to *execute a conveyance* and assignment in such manner and form as the Court shall direct, of *all his real and personal estate and effects*, so as to vest all such real and personal estate and effects in such provisional assignee.

By sect. 6. he is required to deliver in a schedule of all his estate and effects, real and personal, which is to be annexed to the petition and subscribed by him.

By sect. 7., when the Court shall adjudge him to be discharged, they are authorized to appoint a proper person or persons to be assignee or assignees of the estate and effects; and when such persons have signified their acceptance of such appointment, the provisional assignee is to assign to them "in trust for the benefit of the creditors."

The act gives various special powers respecting the property. I do not see what answer to this observation can be made, namely, that every clause and section of the act demonstrates that the property which was the insolvent debtor's is divested out of him, and vested in the provisional assignee, till the Court orders the contrary, and he assigns, subject to the trusts expressed in the act, and subject to the powers by the act vested in the Court.

The two other acts on the subject are 3 G. 4. c.123.

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and 5 G.4. c. 61. Both of these acts are made to amend the 1 G.4. I am not aware that they made any material alteration in the matter in question.

In my judgment, on the true construction of these acts, an irresistible conclusion arises that the whole estate and interest in the premises in question was divested out of the lessor of the Plaintiff, and vested in the provisional assignee, subject to the trusts and powers mentioned in the act; and that the whole management of this property is vested in the Court of Insolvent Debtors.

I have on former occasions declared my opinion on this subject. I have since had time to look accurately into it, in order to discover, if I could, on what solid grounds an opinion can be supported that a legal estate remained in or sprung up again in the lessor of the Plaintiff, the discharged insolvent; but my labour has been in vain.

It appears to me that the provisional assignee is a mere creature of the Court, named for the special purpose of having all the insolvent's property assigned, conveyed to, and vested in him; and when this is done, he can only act as the Court shall direct. That property is to be vested in him, the act expressly states, provisionally. It is necessary it should be vested in him, otherwise he could not assign to the assignee or assignees to be appointed by the commissioners. This, however, is not altogether a new case. In *Crofts v. Pick*, we held that it was not necessary to shew that the provisional assignee had accepted the premises assigned, otherwise than by shewing that he had the assignment. The statute does not make it necessary that the provisional assignee should accept the assignment. That provision is introduced only in the case of the assignees to be afterwards appointed by the Court. *They are to assent before the provisional assignee's assigning to them.*

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This confirms the idea that the whole is vested in the provisional assignee, without any act to be done by him. I conceive this to be the true meaning of the act.

In the case of *Doe on the demise of Spencer v. Clarke*, which was in this Court some time after the case of *Crofts v. Pick*, the provisional assignee recovered in ejectment on his legal title. No objection was made to his recovering on the ground of having no title. He must have had a legal title before he brought his action. If acceptance of the assignment was necessary, it should have been shewn to have taken place before the day of the demise in the declaration.

The provisional assignee is a permanent officer of the Court, created with the manifest intention of having the property of the insolvent divested out of the insolvent, and vested in him till the Court shall appoint other assignees.

His acceptance of the office draws with it all the consequences. He must, from the nature of his situation, be an assignee in innumerable cases. He is a mere stake-holder for the beneficial purposes of the act. It is not, I contend, in his power to object to any assignment made to him.

The opinion I give on this occasion is founded on the peculiar provisions of the insolvent act; on what I consider to be the manifest intention of the legislature, and on the peculiar construction of the office of provisional assignee appointed by the Court.

I am of opinion that all the estate, interest, or property the lessor of the Plaintiff ever had in the premises was divested out of him at the time of the supposed demise, and at the time of bringing his action; and that he is not entitled to recover.

I have not thought it proper to aim at anticipating the grounds on which the Lord Chief Justice will rest his opinion.

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opinion. I am not speaking as an advocate, but delivering my judicial opinion. I cannot bring my mind to think that the authorities on which my Lord Chief Justice's opinion is founded are applicable to the state of facts of this case. I shall ever imagine that it is possible I may be mistaken when I differ from his Lordship. If his argument changes my opinion I will avow it; but it must certainly be a very potent argument to produce that effect.

PARK J. This case, as has been stated, came before the Court upon a motion to set aside the verdict which the Plaintiff has obtained, and to grant a new trial.

I am of opinion with my two learned Brothers who have preceded me, that this rule should be made absolute.

The facts of the case are well known to the Court, but must just be re-stated to elucidate the argument, and they are extremely short. The lessor of the Plaintiff is an insolvent debtor, who had on the 25th January 1825, presented to the Court a petition for his discharge, and assigned his property as the act of parliament required, at the same time, to the provisional assignee, not appointed for this *particular* case, but appointed as the *general* provisional assignee of the Court under the authority of the statute; and the *insolvent was discharged*.

The defence is, that the Plaintiff held from year to year, with an equitable claim for a further lease, and that all his interest passed to the provisional assignee. And I am of opinion that all his *rights, real and personal*, were absolutely, by his *own act*, vested in the provisional assignee at the time of this action brought; that the insolvent by his *express deed* divested himself of his property; that he had then no
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legal right remaining in him; and, consequently, the *legal* estate being in another, he cannot maintain an ejectment.

The system of law respecting the estates of insolvent debtors is a system of itself, connected with and analogous to no other.

There had been many acts respecting insolvent debtors from a very early period in the history of our jurisprudence; but they never were formed into any thing like a system till the reign of his present Majesty; they then assumed a new character, and the statutes of 1 G. 4. c. 119., the 3 G. 4. c. 123., and the 5 G. 4. c. 61., are those alone about which we need interest ourselves in this discussion.

The first of these, viz. 1 G. 4. c. 119., entitled "An act for the relief of insolvent debtors in *England*," reciting that all former acts had been ineffectual, appoints three barristers, one a chief and two others, to be his Majesty's commissioners for the relief of insolvent debtors, and be called "The Court for Relief of Insolvent Debtors," and provides that this *Court*, as soon as the respective appointments shall have been notified in the *London Gazette*, shall have power to appoint a chief clerk, a *provisional assignee*, and other officers.

What, then, are the duties of this permanent officer, the *provisional assignee*? Why, to receive all assignments of property and estates made to him by the *authority of the Court*, not by assignment or conveyance by deed from the commissioners to him,—for *they* by act of parliament have nothing in them to convey,—but by the *direct assignment* by deed of the *insolvent himself*.

There is not one word in the act of any *choice* or any *acceptance* by the *provisional assignee*: *choice* or *acceptance* is all a matter which respects the *permanent assignee*, but not the *provisional assignee*. By accepting the

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the office, and probably having solicited for it, he *has* accepted all the rights, estates, and interests of the insolvent, and has no power whatever to refuse, except by resigning his office: he is the mere creature of the Court and of the act of parliament. And this, as it seems to me, puts an end to all the reasoning of my brother *Lawes*, founded upon the case of *Townson v. Tickell (a)*, where it is said "the law is certainly not so absurd as to force a man to take an estate against his will."

This I admit fully where a man is *sui juris*, but never yet was, and never can be applied to a man who, by the duty of his particular office, is bound to act as a trustee at all times under the direction of a court. As well might *George Humphries* refuse to be common vouchee.

Then what is it that the statute requires the insolvent to do? Observe, however, that no man is bound to become an insolvent debtor contemplated by these statutes; it is an act of the will; there is no compulsion upon him; it is, therefore, not like the case of bankruptcy, which the law supposes to be a case *in invitum*; and where the bankrupt does not *himself* do one act to assign his property: the bankrupt never signs one deed transferring a single atom, real or personal; it is done entirely by the commissioners, never consulting him at all; and no bankrupt ever was the assigning party in a deed since the law of bankruptcy existed. But mark the difference. The statute of 1 G. 4. c. 119. s. 4. enables persons in certain situations, if they are so minded (being entirely optional) to apply by *petition* (their own voluntary act) to be discharged. But what does the act require them, if they be so minded, to do? Their said petition shall be forthwith subscribed and filed, and at the *very time* when the insolvent shall subscribe such petition he shall duly *execute a conveyance*

(a) 3 B. & A. 31.

and assignment of all the estate, right, title, interest; and trust of such prisoner to all the real and personal estate and effects of every such prisoner, so as to VEST all such real and personal estate and effects in the provisional assignee of the said Court: — (giving him no option whether he will accept or no).

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From that moment the insolvent has no more interest in any of his property than I have, except in one instance, which the statute wisely points out, viz. that if the insolvent shall not ultimately obtain his *discharge* (to obtain which discharge was of course the sole object of his assigning his property), such conveyance and assignment shall, from and *after* the *dismissal* of the petition for his discharge, be null and void to all intents and purposes.

But if he *shall obtain* his discharge, his estate, both real and personal, so *entirely vested* in the provisional assignee by the first conveyance, never can revest in the insolvent by any means whatever; for, by sect. 7. of the same act, if the prisoner do obtain his discharge, then the Court are to appoint an assignee or assignees of his effects, and the provisional assignee *is to assign* to such assignee or assignees every such prisoner's estate, effects, rights, and powers *vested* in such *provisional* assignee as aforesaid, in trust for the benefit of themselves and the rest of the creditors. So that it never gets back to the insolvent from the moment when he signed his petition to be discharged, and *at which moment also* he assigned all his *legal and equitable rights*, never to be again vested in him, but in another, unless he should happen not to obtain the benefit he sought.

But here I must take notice of an argument much pressed at the bar, about the *acceptance* by the assignee. Acceptance is not to be found, as I have said, in the statute, as applicable to the provisional assignee, and I

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will venture to say, never was thought of in the case of a provisional assignee under a commission of bankruptcy, the favourite analogy; and I am sure for the nine years I had the honour of being a commissioner of bankrupts, I never once thought of asking our messengers whether they would accept the office of provisional assignee; and in the hundred assignments of that kind I have executed, I never dreamt that they had an option of consenting or dissenting, being, amongst other things, appointed for that very purpose.

The acceptance mentioned as applicable to the permanent assignee in the first and second of these statutes is peculiar. It is not whether, *after* the deed is executed to them, they will or will not accept a *damnosa hereditas*; but the *provisional assignee is not to execute the deed to them at all*, till the permanent assignee or assignees shall have signified to the Court their acceptance of the said appointment, and then the provisional assignee is to assign as I have before mentioned.


But as doubts were entertained in the third year of his Majesty's reign, as to the extent of the powers of the provisional assignee in the *intermediate* stage between the assignment to him, and the ultimate assignment by him to the permanent assignees, it gives him full power (always of course under the authority of the Court) to take possession of all the real and personal estate, and *sell* and dispose of the same. The reason of this is clear, that the estate should come to no damage if a length of time should elapse between the choice of the one kind of assignee and the other. But if he had such a power of suit, how could it remain in the insolvent? And then to shew the provisional assignee to be the mere conduit-pipe of the Court, and that he has no option or acceptance, the same act provides, that if the provisional assignee shall resign or die, the same
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real or personal estate shall go and be *vested* in his successor in office.

The second section of the last-mentioned act provides, that every provisional assignee may *sue* in his *own name* for the recovery, *obtaining*, and *enforcing of any estate*, &c.

Two cannot (in distinct rights) have the *legal* estate in *them* to maintain an ejectment at the same time, and, therefore, the statute goes on to provide, that if the prisoner shall not obtain his discharge, still *all acts* done by the provisional assignee before the estate *reverts*, shall be good and valid. And the third section declares, if he do obtain his discharge so as to prevent the estate revesting in the insolvent, that all acts done by the provisional assignee shall be deemed *valid*, and the estate shall be considered as vested in the *new assignee* by *relation*. I consider this matter to have been decided in this Court in the case of *Doe dem. Clarke v. Spencer* the point in which was, that the provisional assignee under 1 G. 4. c. 119. may sue, in ejectment for *property assigned to him* under that statute. If he can sue an ejectment, the case must have proceeded on the ground that the *legal* estate, by virtue of the assignment by the hand and seal of the insolvent, *vested* in the provisional assignee. Now, then, could the *legal* estate be vested in another at the same time? And we never could have intended that it was immaterial whether the provisional assignee or the insolvent brought that ejectment, or that both might have maintained an ejectment. I quote that case because I see no reason to alter the judgment which, with the other members of the Court, I then formed.

To this judgment I adhere, and if the provisional assignee could maintain an action, I cannot see how the insolvent can also have a right to maintain ejectment.

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The 5 G. 4. c. 61. does not make any alteration, it only appoints additional commissioners, and directs them to go circuits; and section 19. provides against the insolvent's remaining liable to rent, &c. upon delivering up leases, &c. to the assignees, and also enables the assignees to relinquish their right to such leases.

But it is worthy of observation that the assignees having consented to accept, had, in consequence of that acceptance, no opportunity afforded them of relinquishing a lease or agreement for a lease which they might not deem beneficial, from the first of these acts till five years after, viz. the 5 G. 4. c. 61. s. 19., when it was provided for the first time after relieving the insolvent from the payment of rent, upon acceptance of the lease by the assignees, that they may deliver up the same, under the authority of the Court. But to whom? not to the insolvent; to him it never can revert; but to the original lessor or party agreeing for the lease. What then is the result of all these statutes, and in what situation is the insolvent, and how is he placed with respect to his former property? I conceive he stands thus, and these are the inflexible words of the statute, which nothing but an act of parliament can alter: a man in prison may apply by petition to the Insolvent Court for relief; but before he can have a *locus standi in judicio in that Court*, he must *freely and voluntarily*, at the moment he signs and applies to file his petition, execute under his hand and seal a deed of *assignment and conveyance* of all his real and personal estate; and it shall be conveyed (I here use the very words of the statute) *so as to VEST all such real and personal estate in such provisional assignee*. What follows? if he be discharged afterwards (and here the prisoner has been discharged), the estate never *reverts in him*, but is to be conveyed by and out of the provisional assignee to the assignees appointed under the direction of the Court, provided

provided they previously agree to accept the trust, and the property is to be sold, disposed of, and applied to the payment of themselves and other creditors, but the insolvent is never to touch this property again.

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In one event and *one only*, he may do so; — but that event has not happened here, for he has been discharged; — *viz.* if he do not obtain his discharge, the conveyance to the provisional assignee shall be null and void to all intents and purposes, except that the statute 3 G. 4. c. 123. s. 2., in that case, declares, that all acts done by the provisional assignee touching the disposal of the insolvent's property, between the time of its being conveyed to him upon the signing the petition and its re-vesting in the insolvent, shall be good and valid.

Therefore, I am of opinion, that, as the legal property in this lease was absolutely conveyed out of the insolvent by his own deliberate and willing act, and never *revested* in him, because he procured his discharge, he had *no estate* in him whereon to support an ejectment.

But it is said at the bar, that by thus deciding, we shall overturn a great number of cases. I am sure of this, that we shall overturn none with respect to insolvent debtors; and I am no less confident, that I, at least, have no intention of overturning one case quoted at the bar upon this occasion; but as far as my opinion is of any weight, I adhere to them all.

They were all cases of bankruptcy. I have read them all with attention. I was of counsel in one of the first of them, *Turner v. Richardson*, from the northern circuit; and it was followed by *Copeland v. Stevens*, and the point to be extracted from them is this; that the assignees of a bankrupt are not bound to accept a term of years, which may be burdensome instead of profitable to their trust; and unless they do so, no estate passes to them in this respect, by the assignment of the commis-

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sioners, and consequently that the estate and term *still remain in the bankrupt*; and the privity of estate between the lessor and him remains also, so as to leave him liable to rent, accruing subsequent to the bankruptcy.

'I agree this to *have been* the law as to bankrupts; but it is no longer so; for the new bankrupt act of 6 G. 4. c. 16. s. 75., partly founded on a provision of 49 G. 3. and partly new, has provided that no bankrupt, if the assignees *accept* the lease, shall be liable to pay any rent accruing after the commission, or to be sued for non-observance of any of the covenants therein contained; and even *if the assignees decline to accept the same, the bankrupt shall not be liable, in case he deliver up the lease to the lessor*; and if the assignees shall not elect, the lessor, by petition to the Lord Chancellor, may compel them to elect: thus, in a great measure, copying the clause in the insolvent act, which I have before commented on.

But though I thus agree to *Turner v. Richardson* and *Copeland v. Stevens*, and all the other cases laying down the same doctrine, the whole of my argument is founded upon the strong and manifest distinction between the cases of bankruptcy and insolvency. In bankruptcy, the bankrupt *conveys no property*; he *does no act*; he *executes no deed*; he is *supposed* by law, except in one case under the new act of parliament, to be an unwilling *victim to bankruptcy*; but in insolvency, the insolvent is the *primum mobile*; the machine cannot move without him; he is the willing actor: he first petitions, and immediately conveys away all his property; and I am yet to learn how a man *willingly*, and of his own mere pleasure, conveying his property, can immediately after maintain an action for that property in the face of his own solemn deed.

But have I any support for this distinction? I have the authority of one of the greatest and most eminent persons,

persons that ever adorned the *English* bench, I mean Sir *W. Grant*, the Master of the Rolls, in the case of *Shee v. Hale*. (a)

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An annuity had been bequeathed by a man to his son, with a *condition to fall into the residue*, upon his signing *any instrument to sell, assign, charge, or dispose of, or empower any person to receive the annuity*. The son took the benefit of an insolvent act, and inserted this annuity in his schedule. The question was, whether the annuity was to sink into the residue? It was there compared to the case of bankruptcy; and it was said, this was the act of *law*, not of the party.

But the Master of the Rolls marked the distinction. "It appears to me, that the son has done an act to authorise or empower others to receive this annuity. This differs from the case of a bankrupt. The bankrupt has done nothing. The insolvent debtor was not in a situation to be compelled to part with his annuity. He might have enjoyed it for his life. *Signing the petition and schedule appear to me to be clear acts.*"

Surely signing and sealing an actual solemn deed of conveyance and assignment is a much clearer act of the will than signing a schedule.

Holyland v. De Mendez (b), is to the same effect; for there, bankruptcy, opposing it to insolvency, was held not to be such an eviction or dispossession, in the event of which, an annuity from a continuing partner to a retiring partner was to cease; for bankruptcy was not the act of the party.

The same Master of the Rolls decided this case as the former one of *Shee v. Hale*. Therefore, I take the distinction between the cases of bankruptcy and insolvency to be quite clear.

(a) 13 Ves. 404.

(b) 3 Meriv. 184.

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Other cases were mentioned by Brother *Lawes*, which I only mention that I may not be supposed to have been inattentive to his argument; but the application of which, with all due respect to him, I cannot discover.

The case of *Taylor v. Buchanan* (a) was one of these, where the Court of King's Bench decided what nobody could doubt, that an insolvent may sue upon a contract of sale made by him *subsequently to the hearing of his petition before the Court of Insolvent Debtors*; and that if the person he sued upon this new debt was a creditor before the insolvency, and his debt had not been included in the schedule by the insolvent, so as to give the creditor a benefit with the other creditors, his debt was not discharged, but he might set it off against the new demand.

The case of *Hepper v. Marshal* (b), in this Court, decided that under the insolvent act of 1 G. 4. c. 119., by the *assignment at the time of the petition*, the assignee takes only such property as the insolvent had *at the time of the petition*.

In that case it was attempted to assimilate the cases of insolvency to that of bankruptcy, where *after* acquired property, between the commission and the certificate, goes to the assignees.

But Lord Chief Justice *Best* expressly draws the distinction between bankruptcy and insolvency in that respect, for he says, "The conveyance authorised by the 4th section of the statute only transfers the property the insolvent had at the time of the petition; and there is no where in the statute such a provision as is to be found in the 13 *Eliz. c. 7.*, (and now incorporated in the new bankrupt act of 6 G. 4. c. 16. s. 63, 64.) with respect to bankrupts transferring to their assignees all such personal property *as shall come to the bankrupt*;"

(a) 4 B. & C. 419.

(b) 2 Bingh. 372.

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and in another place his Lordship says, "the principal difference between the two systems of law is, that the assignees of a bankrupt are trusted with a power over his future effects, without further resort to the commissioners, but the assignees of an insolvent must apply to the Insolvent Court."

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And my Brother *Gaselee* says, (and in that uses the language of the Chief Justice,) the permanent assignee takes the *same interest* in the insolvent's property as the provisional assignee; and the provisional assignee takes only what the insolvent had at the time of subscribing his petition.

Thus the case of *Hepper v. Marshal* has specified another distinction besides those I had before mentioned, between the systems of bankruptcy and insolvency, each depending upon statutes respectively applicable to themselves, and forming a code perfectly distinct from each other.

But it has been supposed in argument that my Brother *Burrough* and I had decided differently to this in *Crofts v. Pick*, (2 *Bingh.*, and better reported in 8 *Moore.*) If, upon a review of that case, I felt that it was improperly decided, I hope I have too conscientious a feeling of what is due to the judicial character to persist in an error. But I adhere to every word there uttered, and I rejoice that it has been quoted; for there, upon a different act of parliament, — not near so strong as the present; where no provisional assignees are expressly named, as they are in this statute; — I am made to say that which is in perfect accordance with my present opinion.

For all these reasons I am of opinion, with my two learned Brothers, that this rule should be made absolute.

BEST C. J. This was an action brought to recover certain parts of a house which the lessor of the Plaintiff had

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had let to the Defendant. The tenancy was determined by a regular notice to quit. The Plaintiff was himself a tenant from year to year, with an agreement for a lease with his landlord. The defence was, that the Plaintiff had been discharged by the court for the relief of insolvent debtors, that he had inserted his agreement for the lease of these premises in his schedule, and had assigned all his property to the provisional assignee of that court. The provisional assignee had never taken possession of his property, nor manifested in any manner any intention to possess himself of it. Indeed, it is not very likely that the Plaintiff's was a saleable interest.

It is not necessary to decide the general question, whether any assignment of a pure trust passes any estate in the property conveyed in trust, until the trustee has in some manner expressed his acceptance of the trust. I think this case is governed by the principle established by the cases that have decided that an interest in a lease does not pass to the assignees of a bankrupt, unless they think proper to possess themselves of such interest; and that until they determine to take the lease, it remains in the bankrupt, although the statutes relating to bankruptcy authorise the commissioners to assign all the property of the bankrupt, and the terms of the assignment include all the interest that the bankrupt has in any species of property. The principle on which these cases rest is stated by Lord *Ellenborough*, in *Copeland v. Stevens*, in these words: "An assignment by commissioners of bankrupt is the execution of a statutable power given to them for a particular purpose; viz. the payment of the bankrupt's debts; nothing passes from them, for nothing was previously vested in them. Whatever passes passes by force of the statute, and for the purpose of effecting the object of the statute. The three cases of *Bourdillion v. Dalton*, *Turner v. Richardson*, and

and *Wheeler v. Bramah*, were decided on this ground." The learned Lord then proceeds to consider, whether the assignment passes the estate immediately to the assignees, defeasible upon their actual refusal to accept? or does it pass immediately to the assignees, defeasible upon their neglect to do some act manifesting their intention to take it, or is its effect suspended until acceptance? His Lordship decides in favour of the suspension, and then adds: "And if the operation of the deed be suspended, the estate must necessarily remain in the bankrupt during the period of suspension, for it cannot be in abeyance, and must exist in some person."

It is true that the case of an insolvent differs as to the machinery by which the conveyance is effected, from that of a bankrupt, but the object of assignment is in both cases the same. It is not the Court for the Relief of Insolvent Debtors that conveys, but the insolvent; but he conveys only to enable his assignee to raise funds to pay his debts. What cannot be applied to this purpose, or his assignees do not think can be applied for this purpose, does not pass; for the passing of such property, instead of assisting them in the discharge of their trust, would only incumber them. Lord *Ellenborough* says, "Nothing passes but for the purpose of effecting the object of the statute." They are trustees only for the payment of debts; what cannot be applied to the payment of debts is not within the scope of their trust, and does not vest in them by the assignment. I presume, from the assignee's not taking possession of the property for which this action is brought, he, or the Court, whose agent he is, thought it was worth nothing, and, therefore, repudiated it. There is no substantial difference between an assignment by the insolvent, and an assignment by persons duly authorized to make it of all his effects.

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In *Copeland v. Stroens* the commissioners assigned "all other the personal estate whatsoever, and all the estate, right, title, interest, equity of redemption, property, claim, or demand whatsoever, of and in the said demised premises."

By 5 G. 2. c. 30. s. 26., the commissioners of bankrupt "shall assign every such bankrupt's estate and effects."

In the case referred to the assignment not only purports to convey the interest in the term by its general terms, but by words directly and exclusively applicable to it. The commissioners were fully authorised by the statute to make the conveyance, and yet the assignees not accepting the term, it did not pass.

By sect. 30. of 5 G. 2. the commissioners may appoint a provisional assignee of the *estate and effects, or any part thereof*; and such assignee shall, on his removal, deliver up and assign *all the estate and effects* which shall have come to his hands or possession, or which shall have been assigned by the commissioners as aforesaid, unto the assignees chosen by the creditors; and all the estate shall to all intents and purposes be as *legally and effectually vested* in the new assignees as if the first assignment had been made to them by the commissioners." There are no words in the insolvent debtor's acts more operative than these which I have quoted from the 5 G. 2., to vest immediately the interest in a term in the provisional assignee, and afterwards in the assignees chosen; yet we have seen that it passes to neither unless they accept. If it vested in the provisional assignee it would, by virtue of his assignment, vest in the assignees chosen by the creditors, and could not get back again to the bankrupt but by some conveyance from the assignees. No such conveyance has in any instance been made; the estates, therefore, have been treated not as having


having vested and afterwards being divested, but as never having vested either in the provisional assignee or the assignees chosen.

For the reasons given by Lord *Ellenborough* in *Copeland v. Stevens*, it is much more convenient to all parties concerned to consider the interest as not having vested, for then the expence of divesting it, if the assignees find it of no value, is saved.

The 1 G. 4. c. 119. s. 4. says "the prisoner shall execute a conveyance and assignment in such manner and form as the Court shall direct, of all the estate, right, title, interest, and trust of such prisoner to all the real and personal effects of such prisoner, so as to vest all such real and personal estate in the provisional assignee of the court." Section 7. directs the provisional assignee to assign to the assignees chosen by the creditors. There are more words in this statute, but they do not more clearly direct the conveyance of all the estate, either to the provisional assignee or the assignees chosen, than the terms used in the 5 G. 2. Both statutes convey the interest, if the assignees choose to accept it; neither of them forces it upon the assignees, or takes it from the bankrupt or insolvent, until the assignees choose to accept it.

The 3 G. 4. c. 123. authorises the provisional assignee to take possession, and prevents him from disposing of the property of the insolvent without the order of the Court.

In the first section the statute says, "All and every the personal and real estate vested in or possessed by the provisional assignee shall go and be vested in his successor in office." The words *or possessed* shew the true meaning of this passage. Those words would be unnecessary if the assignment vested the property without *his* assent. To give effect to the whole you must read

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read it, "which being conveyed to him he has taken possession of."

It has been observed, that he is a mere creature of the Court. That circumstance does not affect the case. Whether he is to act on his own discretion or under the authority of the Court, he is to have no property *forced* on him which either he or the Court do not think can be applied towards payment of the insolvent's debts, the only purpose for which the assignment is made to him; and what is considered inapplicable to that purpose; although within the letter, is not within the spirit of the act, or embraced by the assignment under it.

The nineteenth section of 5 G. 4. c. 61. seems to adopt the construction put on the 5 G. 2. by the decided cases, and to apply it to the assignees of insolvent debtors. It assumes, that until acceptance of a lease, it is not vested in the assignees. The words are, "if such person shall be entitled to any lease or *agreement for a lease*, and his assignee or assignees shall *accept the same, and the benefit thereupon, as part of the insolvent's estate and effects*, the insolvent shall not be deemed liable to pay the rent accruing after such acceptance as aforesaid; and after such acceptance the insolvent shall not be liable in respect or by reason of non-performance of the conditions, covenants, or agreements therein contained." So that until acceptance by the assignees, it is not a part of the insolvent's estate in their possession. The insolvent remains *liable to all the covenants*, and the relation of landlord and tenant continues between him and his landlord. It would be great injustice to hold that the insolvent, although bound by his covenants with his landlord, could not recover rent from his tenant to enable him to pay it over, and could not recover possession to prevent breaches of the other covenants.

This

This situation the insolvent must remain in until the landlord thinks proper to apply to have the lease given up under the last branch of this section. I think, at all events, whilst he is permitted to remain in possession by his assignees he is a tenant at will, and whilst at will, may maintain any possessory action as a stranger, &c.

In the instance of an insolvent debtor the tenant may protect himself better than in the case of a bankrupt. Until assignment, payment of rent to the insolvent will be a good payment. Of the assignment, the tenant must have notice; he may then tender his rent to the assignee; if he takes it, that will be an election to take the lease; if he refuses it, he may safely pay it to the insolvent. In the case of a bankrupt, some time elapses between the commission and the choice of assignees, and during that period there is no person to whom the tenant can safely pay the rent.

In what a situation is the insolvent placed if the interest in the lease does not remain in him. His landlord, under the 19th section of the 5 G. 4., may get rid of him, but he cannot get rid of his landlord; he may be left liable to pay rent without the means of recovering rent from the person whom he has let into possession.

The principle of *Copeland v. Stevens* has been extended to this case by a very recent decision of this Court,—the case of *Lindsey v. Lambert*. That was an action of covenant brought to recover one quarter's rent. The premises had been granted to one *Biddle*, who was discharged by the Insolvent Debtor's Court. The Defendant was appointed his assignee, and pleaded that *the estate, right, title, and interest of Biddle did not vest in the Defendant, as Plaintiff had in his declaration alleged.*

The Defendant had possession of the lease for several months, and attempted to let the premises. The Court said, "The assignee of an insolvent debtor must be considered

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sidered as standing in the same situation as the assignee of a bankrupt, and that the interest of the insolvent is not to be taken as being conveyed until the assignee shall have done some unequivocal act amounting to an absolute acceptance."

Observe what the Court decided in that case, viz. that the estate of an insolvent did not vest in the assignee. If it did not vest in the assignee, where could it be but in the insolvent. If it was left in the insolvent, what was to prevent him from maintaining an ejectment for it?

In that case the assignee was the one chosen by the creditors, in the present case there is only a provisional assignee, and that distinction was adverted to by one of the Judges. With the greatest deference to the opinion of that Judge, that circumstance can make no difference. The provisional assignee is merely a creature of the Court, and so, I think, is the assignee chosen by the creditors. The Court may direct or controul either as to the taking or refusing a lease; but the question is, not, what is their authority as to the management of the trust? but, what is vested in them to be employed in the execution of the trust? All that is in the provisional assignee is by him conveyed to the assignee chosen. If it vests in the provisional assignee without acceptance, it vests in the assignee chosen without his acceptance, and it cannot be divested but by some conveyance; no such conveyance has ever been thought necessary in any case; and the necessity of such a conveyance is the inconvenience which the Court of King's Bench was anxious to guard against, when they determined in the bankrupt case that the interest never vested in the assignee.

I admit, that to maintain an ejectment, the Plaintiff must have an unqualified legal estate; or, as Lord Kenyon says, in *Webb v. Hall*, "The immediate right to

to real property must be vested in one *person only*; whereas a special property in the case of personalty may be in one, whilst the absolute property may exist in another." But I insist, that if *Copeland v. Stevens*, *Lindsey v. Lambert*, and all the cases that preceded these, were rightly decided, the immediate right to the possession of this property was vested in one person only, and that one person was the insolvent.

The estate, say the Judges, in these cases, was not vested in the assignees; then it was not divested out of the insolvent. It is the case of a grant not accepted, and so the right of the property granted still remains in the grantor.

It has been supposed, that there is a difference between the cases where an action is brought by the landlord against the assignees of a bankrupt or insolvent for rent or for the non-performance of covenants, and an action of ejectment by a bankrupt or insolvent.

One principle governs all the cases, and the different situations of the parties cannot affect that principle. The principle is, that before acceptance, the property is not vested in the assignees. If it is not vested in the assignees, it cannot be divested out of the bankrupt or insolvent. If the assignees cannot be sued because they have no interest, the insolvent may sue because he must have the whole interest.

It has been truly said, that the assignees, by taking the estate, may put an end to the insolvent's interest at any time; but until they do take the estate, it remains in the insolvent. The estate of a tenant at will may be determined at any time; but whilst the landlord permits it to exist, the tenant may maintain against a stranger an action for any wrong done to his right in it.

It has been argued that the provisional assignee is bound to take possession; perhaps he may be bound to

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take possession, but all the cases shew, that taking possession is not an acceptance of the term. An assignee of a bankrupt or insolvent may take possession, and keep it, until he can ascertain whether his acceptance of it will benefit the creditors; and yet such taking possession will not amount to such an acceptance as will vest the property in him. The provisional assignee can do nothing, but take possession, without an order of the Court; the disposition of property is not left to him. He cannot, by any act of his, make it a part of the insolvent's estate. He is not intrusted to decide what shall be taken, and what refused.

Even if this provisional assignee had done, what I admit he ought to have done, namely, taken possession, it would not have affected the question. But he has done no such thing. In *Shee v. Hale* (a), Sir *W. Grant* said, that there was a distinction between the case of a bankrupt and an insolvent debtor; that the latter parted with his property by his own act, which he might still continue to enjoy; yet, on the terms of imprisonment for life.

But the reasoning of Sir *W. Grant* has no bearing on the present case: he used it to bring the case he was deciding within the letter of the will on which the question arose. In the present case it is not material who is the conveying party, the question being whether the property be conveyed. In the decision of that question, there is no difference between a conveyance by the party to whom it originally belonged, and one by other persons who have complete authority to convey it, and who have made an instrument fully executing their authority.

The case of *Crofts v. Pick*, which seems to stand in my way, was not on the acts of parliament on which this case depends. The attention of the Court was not

(a) 13 Ves. 404.

properly called to the question in that case. Nothing was said on the point, whether an assignee was bound to accept what Lord *Kenyon* calls a *damnosa hereditas*. The points raised were, whether, under the terms of that act, it was necessary to shew an express agreement to take the property. The Court said, that by accepting the trust the assignee was bound to do all connected with the trust, and that a provisional assignee has no right to exercise a discretion.

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The question raised in this case was, in the one quoted, kept entirely out of view.

I say the provisional assignee ought to have taken possession of these premises, but I insist that his taking possession could not vest the interest in him; and if it could not, it could not divest it out of the insolvent. If indeed it vested the interest in the provisional assignee, the provisional assignee must by his conveyance vest it in the assignees chosen, and they could not divest themselves of it but by some deed: but if that be so, the case of *Lindsey v. Lambert* lately decided by us, and all the cases relative to leases conveyed under the bankrupt laws, were erroneously decided.

I say that a provisional assignee has only authority to take possession, without any discretion to accept the interest in such property as this: that until the assignee chosen by the creditors accepts the term, it remains in the insolvent, who, although he holds only during the pleasure of the assignees when chosen, holds, as against all others, an absolute estate; just as the cognizor of a fine before the uses are declared, or the surrenderor of a copyhold before the admission of the surrenderee, still continue owners of the estate.

I think this view of the subject is consistent with legal analogy, and with the intent of the trusts on which the property of an insolvent is conveyed.

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I think a decision on this principle would prevent much inconvenience and expence to both creditors and insolvents, and keep the latter out of a situation the most cruel and the most helpless.

Rule absolute.

MEMORANDA.

IN the course of last *Hilary* vacation the Earl of *Eldon* resigned the Great Seal, and was succeeded in the office of Lord High Chancellor by Sir *John Singleton Copley*, Knight, Master of the Rolls, who was created a Peer of the United Kingdom of *Great Britain* and *Ireland*, by the name, style, and title of Baron *Lyndhurst*, of *Lyndhurst*, in the county of *Southampton*. His Lordship took his seat on the Bench of the Court of Chancery on the first day of last *Easter* term.

Sir *John Leach*, Vice-Chancellor, was appointed to the office of Master of the Rolls, in the room of Sir *J. S. Copley*, and was succeeded by *Anthony Hart*, Esq., one of His Majesty's Counsel, who was knighted.

Sir *Charles Abbott*, Knight, Lord Chief Justice of the Court of King's Bench, was created a Peer of the United Kingdom of *Great Britain* and *Ireland*, by the title of Baron *Tenterden*, of *Hendon*, in the county of *Middlesex*.

Sir *Robert Graham*, Knight, one of the Barons of His Majesty's Court of Exchequer, resigned his office, and was succeeded by *John Vaughan*, Esquire, one of His Majesty's Serjeants, who was knighted.

Sir

Sir *Charles Wetherell*, His Majesty's Attorney-General, resigned his office, and was succeeded by *James Scarlett*, Esquire, one of His Majesty's Counsel, who was knighted.

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In the course of *Easter* term Mr. Serjt. *Bosanquet*, Mr. Serjt. *Taddy*, Mr. Serjt. *Cross*, and Mr. Serjt. *Wilde*, were respectively appointed His Majesty's Serjeants, and took their seats within the bar accordingly.

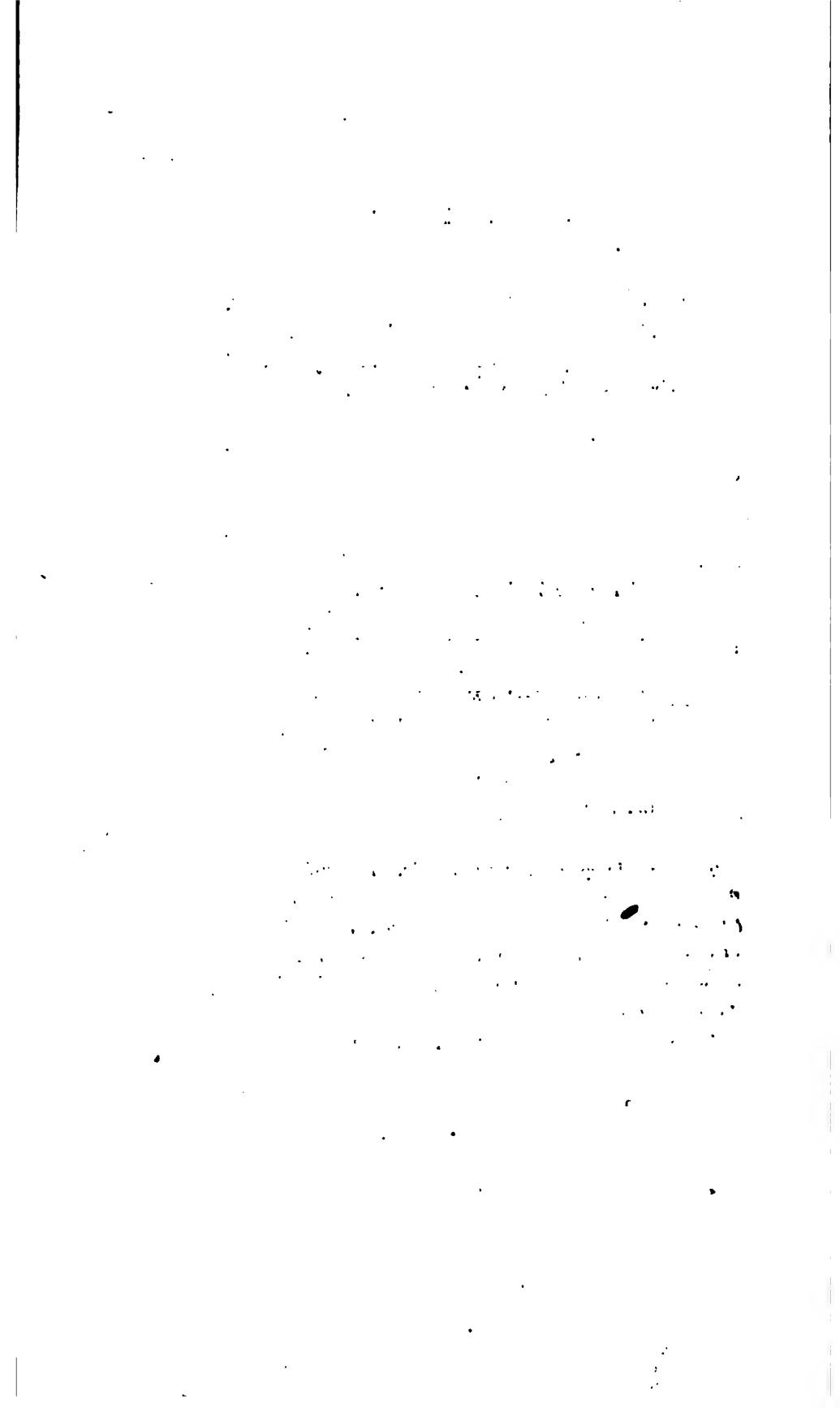
Henry Brougham, Esquire, received a patent of precedence.

Thomas Charles Treslove, *George Rose*, *Henry Bickersteth*, *John Williams*, *John Campbell*, *Jonathan Frederick Pollock*, and *Horace Twiss*, Esquires, were respectively appointed His Majesty's Counsel learned in the law, and took their seats within the bar accordingly.

In *Trinity* term, *Charles Frederick Williams*, *William Selwyn*, Esquire, and the Honourable *Thomas Erskine*, were respectively appointed His Majesty's Counsel learned in the law, and took their seats within the bar accordingly; and

Thomas Andrews, *Henry Storks*, *Edward Lawes*, *Edward Ludlow*, *Henry Alworth Merewether*, *William Oldnall Russell*, *David Francis Jones*, *John Scriven*, *Henry John Stephen*, and *Charles Carpenter Bompas*, Esquires, were called to the degree of the Coif, and gave rings with the following mottos: the seven first, "*More majorum*," and the three last, "*Lex ratione probatur*."

END OF TRINITY TERM.



CASES

ARGUED AND DETERMINED

1827.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

In the Eighth Year of the Reign of GEORGE IV.

MEMORANDA.

In the course of the last vacation, Sir *Anthony Hart*, Knight, Vice Chancellor of *England*, was appointed Lord High Chancellor of *Ireland*, on the resignation of the Right Honourable Lord *Manners*; and *Lancelot Shadwell*, Esquire, one of his Majesty's counsel, learned in the law, was appointed to succeed Sir *Anthony Hart* as Vice Chancellor, and took his seat accordingly on *Friday*, the 2d *November*.

Lord Chief Justice *Best* was prevented from attending in Court during the whole of this term by severe illness.

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Nov. 10.

MOUNT V. HARRISON.

Abandonment
is not necessary
upon a loss in
an insurance
on freight.

ASSUMPSIT on a policy of insurance on freight,
per the ship *Olive Branch*.

At the trial before *Park J.*, London sittings after *Trinity* term, it appeared that the *Olive Branch* was driven on shore in *Table Bay, Cape of Good Hope*, by a tremendous storm, on the 21st of *July 1822*, and imbedded eight feet in the sand above high-water mark, very much strained and damaged; that the cargo, one third of which was on board and the rest engaged, was sent to *England* by another vessel; that surveys were made, and experienced persons being of opinion that the ship could not be got off except at a ruinous expence, she was sold by the captain a week or ten days after the stranding; that the purchasers got her off in about three months, after several unsuccessful attempts; and that being then repaired, she afterwards performed many voyages. The captain effected the sale *bond fide*, as the best course at the time, for the interest of all parties.

On the part of the Defendant it was objected, first that there ought to have been an abandonment of the freight; and, secondly, that as the vessel was repaired by the purchasers, and despatched on new voyages, there could not have been an extreme necessity for the sale effected by the captain, in which case only would it have been justifiable.

The learned Judge on the authority of *Ille v. Royal Exchange Assurance Company (a)*, and *Green v. Royal Exchange Assurance Company (b)*, directed the jury, that under the circumstances of this case, an abandonment

(a) 8 Taunt. 755.

(b) 6 Taunt. 68.

of freight was not necessary, and left it for them to determine whether the captain was justified in selling the ship.

A verdict having been found for the Plaintiff,

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Parry Serjt. moved for a new trial, on the objections above stated. There ought to have been an abandonment of the freight. A contract of insurance is only a contract for an indemnity; but the insured receives more than an indemnity if he obtains the amount of the freight, without the expence of conveying the cargo, and his policy is, in effect, a wagering policy. Therefore in *Parmeter v. Todhunter* (a), Lord Ellenborough held, that in the case of an insurance on freight, the insured could not recover as for a total loss without an abandonment, if the goods were in existence, although both ship and cargo were sold. In *Idle v. Royal Exchange Assurance Company*, and *Green v. Royal Exchange Assurance Company*, it was only determined that an abandonment was not necessary and that a sale of the ship was justifiable, under the peculiar circumstances of those cases respectively.

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PARK J. I think there ought not to be any new trial. As to the abandonment, confining my opinion to the circumstances of this case, I think it was not necessary, and I fully concur in the decision of *Idle v. Royal Exchange Assurance Company*. That decision is only met by the *anti prius* case of *Parmeter v. Todhunter*. And Gibbs C. J., when that case was cited in *Green v. Royal Exchange Assurance Company*, said, he could not understand what was to be abandoned. If, as has been insisted, the not requiring an abandonment should lead to fraud, that may be enquired of in the particular case.

(a) 1 Campb. 541.

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As to the propriety of the sale, I thought it to clear that I did not press it on the jury, and they without hesitation found for the Plaintiff.

BURROUGH J. The necessity of the sale was altogether a question for the jury. As to the abandonment, I thought in the case of *Idle v. Royal Exchange Assurance Company*, that there was nothing to abandon in an insurance on freight, and I am of the same opinion still.

GASELEE J. I am of the same opinion on both points. With respect to the freight there was nothing to abandon, for the goods were immediately put on board another ship, and the underwriters could have gained nothing had an abandonment been made.

Rule refused.

Nov. 10.

HUBBARD v. JACKSON.

A bill payable to the order of the drawer having been dishonoured by the acceptor and paid by the drawer when due, Held, that the drawer might indorse it over a year and a half afterwards, and that his indorsee might recover against the acceptor.

ASSUMPSIT on a bill of exchange, drawn, December 25. 1820, by *Melville* upon and accepted by the Defendant for 30*l.* three months after date, payable to the order of *Melville*.

This bill, before it was due, *Melville* indorsed to *Wallace*, and the Defendant having dishonoured it, *Wallace*, in 1821, recovered the amount of *Melville*, with costs. About a year and a half afterwards, *Melville* indorsed it to the Plaintiff, who now sued the Defendant.

A verdict having been found for the Plaintiff at the *Guildhall* sittings after last term,

Storks

Stovis *Serjt.* moved to set aside the verdict, and enter a nonsuit, or to have a new trial, on the ground that *Melville* had no right to negotiate the bill again after it was overdue and paid, if such negotiation would make any of the parties liable who would otherwise have been discharged. *Brick v. Robley.* (a) He admitted, however, that in that case the bill was drawn payable to the order of a third person, and that in *Callow v. Lawrence* (b) it was holden that an indorsee who pays a bill may indorse or negotiate it.

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The Court thought the case of *Callow v. Lawrence* in point, and referred to the language of Lord *Ellenborough*, who said, "A bill of exchange is negotiable *ad infinitum* until it has been paid by or discharged on behalf of the acceptor. If the drawer have paid the bill, it seems that he may sue the acceptor upon the bill; and if, instead of suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor. The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsers."

Rule refused.

Hubbard v. Jackson 1827.

13 M. & W. 291. (b) 3 M. & W. 95.

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Nov. 12.

WILLES and Another, Assignees of ELLIOTT,

v. ELLIOTT.

Where an insolvent dies after petition and assignment to his provisional assignee, but before examination and assignment to his assignees in chief, Held, that the assignees in chief take, nevertheless, all the property assigned by the provisional assignee.

TROVER by the assignees of an insolvent debtor. At the *Middlesex* sittings after last term, before *Best* C. J., it appeared that the insolvent's petition for his discharge was presented to the Insolvent Debtor's Court on the 7th of *February* 1827, and that he assigned his estate and effects to the provisional assignee on the same day. On the 26th of *March*, previously to his petition being heard, or his passing any examination, he died.

On the 3d of *April* the provisional assignee assigned his estate and effects to the Plaintiffs, the assignees in chief.

Under these circumstances, it was objected that the Plaintiffs could not recover. The Lord Chief Justice thought there was no ground for the objection, but reserved to the Defendant leave to move to enter a nonsuit. A verdict having been found for the Plaintiffs,

Taddy Serjt. obtained a rule *nisi* to enter a nonsuit instead, on the ground that by the 7th of 4. c. 57. s. 11. it is provided, "that in case the petition of any prisoner shall be dismissed," the assignment of his estate and effects to the provisional assignee "shall from and after such dismission be null and void to all intents and purposes;" that the insolvent's death before examination was equivalent to a dismission; that by the provisoes of the act the assignees were only entitled to his estate in virtue of his discharge, the discharge under the act being the price paid by the creditors, the condition

dition precedent imposed, for the distribution of his estate among them; and that, at all events, the prisoner's death before adjudication operated as a revocation of his assignment to the provisional assignee.

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PARK J. now said that the Lord Chief Justice, who had been applied to, entertained no doubt on the point; that the Court concurred with him in thinking the assignment to the assignees in chief perfectly valid, seeing that the insolvent is no party to that assignment, and that the assignees in chief, by the express words of the act, take all the estate and effects of the insolvent which passed to the provisional assignee in the same manner as if the conveyance and assignment had originally been made by the insolvent to them. 7 G. 4.

c. 57. s. 19. "After such conveyance and assignment by such provisional assignee, all the estate and effects of such prisoner shall be, to all intents and purposes, as effectually and legally vested, by relation, in such assignee or assignees as if the said conveyance and assignment had been made by such prisoner to him or them."

Rule refused.

ii. 11 a. 583. **HOWARD v. BROWN.**

Nov. 13.

RUSSELL Serjt. moved to cancel a bail-bond in this cause on the ground that the jurat of the affidavit to hold to bail (which had been sworn in the country)

did not state the person before whom it was sworn to be a commissioner, as it ought to have done. *Rex v.*

Harv. (u)

(a) 13 East, 189.

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Wilde

An affidavit of debt sworn before a commissioner in the country is insufficient, if it do not state the party before whom it is sworn to be a commissioner.

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HOWARD

v.

BROWN.

Wilde Serjt. The affidavit is entitled in this Court, signed with the commissioner's name, and the Court has the means of knowing who are its own commissioners. *Rex v. Hare* was a criminal proceeding, and the affidavit was not entitled of any court. At all events, the Court will allow a supplemental affidavit. But

THE COURT refused a supplemental affidavit, and, on the authority of *Rex v. Hare*, made the rule

Absolute.

Nov. 12.

LIMERICK and WATERFORD Railway Company
v. FRASER.

Plaintiff, an Irish company, whose concerns were all carried on in Ireland, were compelled to give security for costs, notwithstanding an affidavit that they had money in a banker's hands in London, and that many of the members resided in England.

MEREWETHER Serjt. showed cause against a rule calling on the Plaintiffs to give security for costs, upon an affidavit that the company had £000^l in a bank in London, and that nearly all the members of the company resided in England.

Wilde Serjt., who had obtained the rule upon an affidavit that all the concerns of the company were carried on in Ireland, and that it had no tangible property in England, insisted that the money alleged to be in the London banker's hands was not a sufficient answer to the application; and

THE COURT being of this opinion, the rule was made

Absolute.

SAMUEL BLACKBURN v. JOHN BLACKBURN.

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Nov. 19.

ACTION on the case for a libel, charging the Plaintiff with having committed a forgery, to which the Defendant pleaded, as a justification, that the Plaintiff had committed a forgery in the manner charged. The declaration contained no allegation of special damage.

At the trial before Gaselee J., London sittings after Trinity term last, it appeared that, in the beginning of 1827, the Plaintiff, a dissenting minister and candidate for the charge of a congregation, finding that rumours had been circulated to his prejudice, instituted an enquiry, which terminated in his friends printing and circulating among the congregation the following circular, the statements in which, touching the alleged forgery and the conduct of the Defendant, were fully substantiated by the evidence adduced at the trial.

A jury, directed to find whether a libel submitted to their consideration were a privileged communication, and if so, whether it were attended with express malice, found for the Plaintiff soft damages, and that the Defendant was not actuated by express malice.

Held, that the Plaintiff was entitled to retain his damages.

Bethnal Green, 15th February 1827.

Dear Sir,

"The object for which the following statement is transmitted to you is obvious, and therefore requires no comment: it is sent in the hope that if the unfounded calumnies it refutes should have reached you, the minister they were designed to injure may be restored to the possession of the unimpeachable reputation both in the church and in the world we are persuaded he deserves.

"We remain,

"Dear Sir,

"Your affectionate friends and servants,

"John Kello,

"Minister of Bethnal Green Meeting.

"Robert Garrett, }
"John King, } Deacons.

"The

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On the increasing infirmities of the Reverend John Kello having rendered it expedient that regular assistance in his public labours should be procured, occasional supplies were engaged for part of the Lord's day, who met with various degrees of acceptance; and some painful differences of opinion having arisen respecting the right of procuring the assistance, which all admitted to be necessary, led to the resignation of the deaconship by Mr. Briscoe. In this state of things, and subsequent to Mr. B's resignation, the Reverend Samuel Blackburn was invited in August last to preach a single sermon, which was so much approved as to induce an immediate application to him by the Reverend J. Kello and the deacons for his future services, and thus he was engaged from Sabbath to Sabbath with increasing approbation, until, at the expiration of two months, a meeting of the church and congregation was publicly convened, to consider of the propriety of inviting him to supply the pulpit on the Lord's day for a specific period. At this meeting Mr. Briscoe and Mr. W. L. Sturtevant were present, and made several vague insinuations against the private character of Mr. Blackburn, which led to the postponement of the business for four days, to give time for further enquiries. Having received the most inacceptable and satisfactory testimonies from those who had known Mr. Blackburn intimately for many years, attested to the fact that he had lived in great respectability in the immediate neighbourhood for the last nine years; and as the opposing parties absented themselves from the second meeting, by which it might be inferred, they admitted their previous opinions to be unfounded, an unanimous invitation for three months was agreed to and transmitted to Mr. Blackburn, signed by the aged minister and deacons on behalf of the church and congregation. From the increasing number of hearers, and some pleasing indications of usefulness which

which had resulted from his ministry during these three months, towards the close of that period another public meeting was convened, which was more numerously attended than the former, and an invitation for an additional three months was unanimously agreed to.

"The Reverend J. Kello, in conveying to Mr. Blackburn the request of the meeting, added, 'if the first invitation was unanimous, the second is enthusiastic.' It was now that unpleasant rumours, which were traced to Mr. R. L. Sturtevant, began to create uneasiness, and Mr. Garrett, the senior deacon, waited on him, and enquired what grounds he had for the reports he had circulated respecting Mr. Blackburn? The reply of Mr. Sturtevant was, 'if Mr. Blackburn has put his uncle's name to a bill of exchange, which he was obliged to pay to prevent him from being prosecuted;' and added some other circumstances, which, if true, involved the moral consistency of Mr. Blackburn. The result of this conference was communicated to the Reverend J. Kello, who informed Mr. Blackburn of the serious imputations cast upon him.

No sooner was the communication made to Mr. Blackburn, than he sought an interview with Mr. R. L. Sturtevant, and requested him to accompany him instantly to his uncle, Mr. J. Blackburn, No. 126. Minorie, with whom he had held some sort of intercourse for the last twelve years. They went accordingly; and the Reverend J. Blackburn, having ascertained that Mr. Sturtevant had really received from Mr. J. Blackburn some communications calculated to induce him to suppose that the imputation was well founded, a meeting was arranged for the following Thursday, at which were present, Mr. Sturtevant, senior, Mr. R. L. Sturtevant, junior, Messrs. Garrett and King (the deacons of the church), and Mr. J. Blackburn, from whom the injurious report

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had originated, and who was now requested to produce the bill on which he had rested his insinuations of fraud, or forgery, or both.

"It is not for man to judge the motives of his fellow-men, they can only be known to God. The following, however, are the facts, as clearly developed at this meeting:—when Mr. *John Blackburn* was requested to produce the bill, he affected great reluctance, cautioned his nephew, the Rev. Mr. *S. Blackburn*, who appeared impatient for its production, that he would not be answerable for the consequences if it were produced, and, in fact, led every person present to the painful conclusion, that the document would confirm the charges, and justify those who had brought it forward. At length the bill was exhibited, and was found to be a simple bill of exchange drawn thirteen years ago, accepted by Mr. *S. Blackburn*, and made payable at No. 126, *Minories*, his uncle's residence, where he occasionally resided when in town, the necessary funds to meet the payment of the bill, except nine shillings, being also sent by him to his uncle before the bill became due, in a letter which was also produced, stating that such bill would be presented, and requesting that it might be taken care of till he came to town. In fact, the whole transaction was honourable and regular, and proved nothing but the evil disposition of the individual who could attempt to extract from it any other meaning.

"In consideration of Mr. *R. L. Sturtevant* having received the impression from Mr. *J. Blackburn* (though not expressed in language sufficiently explicit to make him legally responsible), and having consented to repair the injury as much as possible by publishing this refutation, and offering his apology, the Rev. *S. Blackburn* has consented to forego the legal proceedings he had commenced against him, he having had no object

in taking such a course, but the complete vindication of his character from the aspersions cast upon it,

"Robert Garrett.

"John King.

"S. Sturtevant.

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"Witness, *William Brown.*

"Dated this 15th *February* 1827.

"I, *Richard L. Sturtevant*, hereby express my deep regret for having been so far imposed on by the representations of Mr. *J. Blackburn*, of No. 126. *Minories* (the uncle of the Rev. *S. Blackburn*), as to make the injurious and unfounded imputations referred to in the foregoing statement, which I admit to be a correct representation of the facts and circumstances it professes to explain; and I sincerely hope it will have the intended effect of completely removing from the said Rev. *S. Blackburn's* character any suspicions which may have attached to it in consequence of such imputations.

"*R. L. Sturtevant.*

"Witness, *William Brown.*

"Dated this 15th *February* 1827."

Three months after the circulation of this paper, the Defendant addressed the following letter, which was the libel complained of, to Messrs. *Garrett* and *King*, and caused it to be delivered to them; in consequence of which the Plaintiff was removed from the ministry of the congregation to which he was attached, and the present action was commenced.

"To the Rev. *John Kello*, and Messrs. *Garrett* and *King*, the pastor and deacons of the independent church at *Bethnal Green*.

"Gentlemen,

"By a printed paper which you have circulated, bearing the date of the 15th *February* 1827, you have pub-

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 Blackburn published a statement respecting my conduct which is so untrue in point of fact, and so defamatory in its tendency, that I have the assurance of my legal adviser that I could successfully prosecute you for a malicious libel; I wish not, however, to resort to a mode of justification which, amongst believers, is forbidden by apostolical authority, especially as I anticipate that when you are in possession of the facts I have to communicate, that you will, as becometh Christians, confess your mistake, and retract the injurious statement you have circulated against me. And here permit me to premise, that however it may be insinuated, that private and unworthy motives have excited my opposition to the Rev. S. Blackburn, I rejoice that I can appeal to the Searcher of hearts. My only consideration has been what may best promote the real interest of truth and holiness, and the real interest of the kingdom of Christ; indeed, to every considerate mind, it must appear reasonable that I should not needlessly desire to involve one who bears my name and partakes of my blood, in a reproach which must necessarily lessen the general respectability of my family in the opinion of all those who may be informed of the exposure. But dear as my name and reputation may be, yet I trust the cause of Christ is still more dear to me, and solicitude for its interest, in connection with your church, has involved me in this most painful, though necessary vindication.

"Let me, then, in the first place, remind you, that I did not seek for an opportunity to expose the conduct of the Rev. S. Blackburn, but that Mr. R. Sturtevant, as a member of the church about to choose that reverend person as their co-pastor, applied to me in all the confidence of old acquaintance, to inform him what were my views of that individual's character: now, as I consider it as one of the most fearful calamities that can befall a church of Christ to receive as its pastor a man of questionable

tionable character. I did in the confidence of a Christian intercourse, and upon his promise to keep the matter secret, inform him of that transaction, to which your letter alludes, and which, associated in my mind with other facts, has produced impressions concerning the moral habits of the party concerned, which I will not now describe.

"I had, indeed, received statements from *Conterbury* and *Luton*, respecting the character of the reverend gentleman, whilst travelling in the Wesleyan Methodist connection, no way to his honour, but I could not prove them; statements from the counties of *Nottingham* and *Derby* (unsought for by me), upon the authority of some of the most respectable ministers in those districts, that the conduct of the individual in question, when an independent minister in their neighbourhood, was not irreproachable, but then I could not substantiate them.

"Yet these statements, supported by credible testimony together with the facts in my own possession, produced an amount of moral evidence, the force of which I shall feel as long as I live; and, therefore, I did think it a duty to my friend *Sturtevant*, and to the church at *Bethnal Green*, to put him in possession of the facts of that bill transaction, which, in my own judgment, includes both falsehood and fraud. However, to confidence was betrayed by Mr. *R. L. Sturtevant*, you will well know, and that I was compelled to maintain my own veracity by producing the bill in question at the meeting you describe, on which I attended, without even a friend to witness for me the statements which were made. The transaction of that evening you thus describe:

"A meeting was arranged for the following *Thursday*, at which were present Mr. *Sturtevant*, senior; Mr. *R. L. Sturtevant*, Messrs. *Garrett* and *King*, the deacons of Mr. *Kello's* church, and Mr. *J. Blackburn*, from whom the

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the injurious report had originated, and who was then requested to produce the bill on which he had rested his insinuations of fraud or forgery, or both. It is not for man to judge the motives of his fellow-men; they can only be known to God. The following, however, are the facts, as clearly developed at this meeting:—When Mr. *J. Blackburn* was requested to produce the bill, he affected great reluctance, cautioned his nephew, the Rev. *S. Blackburn* (who appeared impatient for its production), that he would not be answerable for the consequences if it were produced; and, in fact, he led every person present to the painful conclusion, that the document would confirm the charge, and justify those who had brought it forward. At length the bill was exhibited, and was found to be a simple bill of exchange, drawn thirteen years ago, accepted by Mr. *Randall Blackburn*, and made payable at No. 126, *Manaries*, his uncle's residence, where he occasionally resided when in town; the necessary funds to meet the payment of the bill (except 9s.) being also sent by him to his nephew before the bill became due, in a letter, which was then produced, stating such a bill would be presented, and requesting it might be taken care of till he came to town. In fact, the whole transaction was honourable and regular, and proved nothing but the evil disposition of the individual who could attempt to extract from it any other meaning.

“I admit your statement in the general, but during the time the reverend gentleman ever resided in my house, he ever slept there more than one night. If you recollect, I cautioned your reverend friend respecting the consequences, because I believed it was fraudulent in its character, and might involve penal results of no defensible kind: how far my impressions were correct you will learn from the opinion of *Thomas Denman, Esq.*, the Common Serjeant of London, who, as one of the metropolitan

metropolitan judges, may be supposed competent to decide that question.

"Permit me, however, first to lay before you the case which has been submitted to that learned gentleman, the facts of which can be substantiated on oath.

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'CASE.

'*Samuel Blackburn* being indebted to *Mr. Brackly* of *Canterbury*, in the sum of 20*l.* 9*s.* for goods sold, gave to him the following bill:—

'*London, July 28th, 1814.*

'Two months after date, pay to me or my order, the sum of twenty pounds nine shillings sterling.

'£20 9 0

'SAMUEL BLACKBURN.

{ To *Mr. Samuel Blackburn*, 126. *Minories*.

'Accepted, *Samuel Blackburn*.

'The bill and acceptance is in the hand-writing of the drawer, who at the time he gave the bill represented to *Mr. Brackly* that *Mr. Samuel Blackburn*, the pretended debtor, was his uncle, and in the receipt of rents for him. This was in part false, for although his uncle did live at 126. *Minories*, at which place the bill was addressed, his name was not *SAMUEL Blackburn*, but *JOHN Blackburn*, and he was not in the receipt of any rents for his nephew, or indebted to him in any sum; nor did he give him any authority to draw the bill upon him. By the day the bill became due, *Samuel Blackburn* sent to his uncle *John Blackburn* the amount of the bill (less nine shillings), which when presented was taken up by the uncle with the money sent him by the nephew for that purpose, and the bill is now in the possession of the uncle. It will be perceived that the transaction took place nearly thirteen years since; but circumstances have recently transpired which make it necessary for the

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uncle of the drawer and acceptor of the bill to take an opinion upon the following points.

"On this case Mr. Denman's opinion was requested on several points, but it is only necessary for me to state to you the first question proposed, viz.

"Whether the acceptance was a forgery of Samuel Blackburn, he drawing and accepting the bill, and negotiating the same under the false representation before mentioned?

'Answer. — On the principle of *Mead v. Young*, 4 T. R. 28., I think the acceptance written on the bill, under the circumstances stated, was a forgery.'

"To this measure have I been driven in my own defence by your indiscreet zeal, and with you must rest all the consequences of this exposure. I presume, however, gentlemen, that this judicial opinion will cause you to feel, that the statement to which you have lent your sanction, 'that the whole transaction was honourable and regular,' is somewhat doubtful; and that your charges of 'imposition and evil disposition' are as groundless as they are injurious. I now then solemnly call upon you as the officers of a church of Christ, who ere long will be our Judge, to take those measures which Christian equity demands, to remove from my character those aspersions, which, without provocation, you have cast upon it. I do not wish to publish these things to the world; it is fearful enough that the church should hear those things which would make the enemies of godliness to triumph, but from you they could not be withheld.

"Respecting your reverend friend, I wish only to add, that if he were only prepared with the ingenuousness of Christian repentance to confess his past iniquities and sins, no one would rejoice more sincerely in the evidence of his penitence, and in the prospect of his usefulness, than myself; but if he proudly denies

facts

facts which are notoriously true, I can only anticipate, that he will be found like 'evil men and seducers, who are worse and worse.' Waiting your reply,

"I am, Gentlemen,
"Your faithful Servant,
"May 18. 1827." "JOHN BLACKBURN."

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Brackly, who was called as a witness on the trial, said he recollected no more of the transaction than that he had never required of the Plaintiff to have a bill on any other person. But in a letter written in *Brackly's* name in 1815 (and received in evidence after a contest touching its admissibility) it was stated, — in answer to enquiries addressed to *Brackly* by the Defendant shortly after differences had first arisen between the Defendant and the Plaintiff, — that the Plaintiff, upon occasion of giving the bill, had said the acceptor was his uncle, and in the receipt of rents for him. The signature of the drawer and acceptor of the bill were both in the same hand-writing, as well as the same name.

Gaslee J. left it to the jury to determine whether the Defendant's letter was a confidential communication, made *bonâ fide* in answer to the enquiries instituted, touching the Plaintiff's conduct, and if so, whether it was or was not accompanied with express malice, because in the event of the jury's finding express malice, the Defendant would be responsible, even though the Court should be of opinion that the communication was privileged. If the jury should be of opinion that the communication was not called for, they would find for the Plaintiff.

The jury found for the Plaintiff, damages 50*l.* They found also that he was not guilty of forgery, and that the Defendant was not actuated by express malice; whereupon

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Cross Serjt. moved for a rule, calling on the Plaintiff to show cause why the verdict should not be entered for the Defendant on the general issue, and for the Plaintiff on the special pleas, and the award of damages be set aside; or why the verdict should not be set aside and a new trial be had. The ground of the motion was as follows:—Malice is the gist of an action for libels. *Bull. N. P.* 8, 9; and though, when there is no finding to the contrary, malice may be implied from language calculated to do an injury, yet such implication can never be raised contrary to an express finding that no malice existed. No distinction can be raised between implied and express malice, or malice in law and malice in fact, except in the different degrees of evidence required to establish them, the latter being apparent, the former, as it were, latent; but the sufficiency of the evidence is plainly a question for the jury. The jury in the present case having found there was no express malice, have determined upon the evidence, and have in effect found for the Defendant on the general issue; the award of damages being inconsistent with the finding of no malice, more especially as no special damage has been alleged. A rule nisi having been granted, and the Defendant

Wildes Serjt., on showing cause, contended, that the first and chief question left to the jury having been, whether the Defendant's communication was confidential and privileged? the verdict of the jury on the general issue, and the award of damages, had reference to that question, and was, in effect, a finding that the communication was not privileged; in which case the expressions employed were such as to entitle the Plaintiff to damages, even though they were not the result of express malice. They were, indeed, such, that if accompanied with malice, the Plaintiff would have been equally entitled to recover, even if the communication had been found

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A privileged communication, and it was manifestly with a view to the possible determination of the Court on the subject of privileged communication, that the jury had considered the question of express malice. As there could be no pretence for calling the Defendant's unsolicited letter a privileged communication, the Plaintiff was entitled to recover for the injury unavoidably resulting from so mischievous a charge, even though the Defendant were not actuated by malice. *Brunnaga v. Press* (1871) 10 Q.B. 101. In support of his rule, maintained, that it was impossible to ascertain with what view the jury had come to their finding on the subject of malice; but that finding, being unequivocal, was incompatible with a verdict for the Plaintiff in an action for a libel, and he referred again to the cases in *Bull. N. P. 8, 9, & 3 Ill. Rep. 425*, and *Christy's* note thereon, to show that express malice must be proved to render a party liable in an action. The Court Mr. Denman's opinion was produced. It contained several passages omitted in the Defendant's letter, and, among others, an intimation that no one would believe a forgery had been committed under the circumstances stated, and that a prosecution would certainly fail. The Plaintiff felt no difficulty in the decision of this case, and was of opinion that the rule must be discharged. The point to be determined has been most accurately left to the jury. Was this a privileged communication for or not? and if it was, was it attended with malice? because, if so, the Defendant is not excused, and being acquitted, the Plaintiff is entitled to recover. *See B. & C. 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.*

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notwithstanding the privilege. Giving an answer to enquiries touching the character of a servant, or of a tradesman, are privileged communications, but if express malice be shown, they are not protected. In *Edmondson v. Stephenson* (a) Lord Mansfield said, "If, without ground, and purely to defame, a false character should be given, it would be a proper ground for an action." In the present case all that passed at the meeting of the parties may be considered to have been a privileged communication; but the libel in question makes new allegations which the Defendant is not able to substantiate, and which he publishes, unasked, three months after the enquiry at the meeting. It was not left to the jury to say generally, whether this publication was attended with express malice, but, only, whether, supposing it to be a privileged communication, it was, nevertheless, attended with malice. On that supposition the jury negative the existence of express malice, but by finding for the Plaintiff, notwithstanding, they find that the communication was not privileged; and in that case malice in law is implied from the doing a harmful act for which there is no excuse. (After animadverting severely on the Defendant's conduct, the learned Judge proceeded.) This was a foul and unjustifiable libel; for even though the Defendant's first statement at the meeting should be deemed privileged, he had no excuse for going on slandering till he had effected the ruin of his nephew. If I give a servant a bad character, and the jury find it a privileged communication, I stand excused; but if it be proved that I proceed to say I will ruin him, and act accordingly, I am justly liable for the consequences. The only objection to the present verdict is, that the damages ought to have been much higher.

(a) *Bulk N. P. 8.* **BOOK**

BURROUGH J. This is not a privileged communication, but a most foul libel, and the verdict is right in every thing but the quantum of damages. In cases of giving character malice is the gist of the action. But for defamation or libel which a Defendant cannot justify by proving its truth, he is liable at all events. (a)

Rule discharged.

(d) *Quidley J.* was at Chambers, but expressed his concurrence through *Mr. J. Park*.

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CAREWATER, Assignee of THOMAS CRESSWELL, a Bankrupt, v. H. R. CRESSWELL.

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COVENANT. Upon oyer it appeared, that, by a deed of 28th October 1825, between *Thomas Cresswell*, fish-factor, of the one part, and *H. R. Cresswell*, fishmonger, of the other, *Thomas Cresswell*, in consideration of the covenants in the deed contained, assigned to *H. R. Cresswell* all that branch or portion of the trade of him *T. C.* carried on at *Billingsgate*, consisting of purchases and assignments from *Scotland*, and, also, his interest in certain salmon fisheries there, and covenanted not to interfere or act in the branch of the business so assigned. *H. R. Cresswell*, in consideration of the assignment and covenants thereinbefore entered into by *Thomas Cresswell*, covenanted on his part to pay *Thomas Cresswell* an annuity of 250*l.* by quarterly payments every year; to abstain from interfering in the branch of trade still carried on by *Thomas Cresswell*, and to refer differences to arbitration.

T. C., in consideration of covenants by *H. R. C.*, covenanted not to interfere in a certain branch of the *Scotch* fish business, and to assign to *H. R. C.* a certain *Scotch* fishery; *H. R. C.*, in consideration of the assignment, and of *T. C.*'s covenant, covenanted to pay *T. C.* an annuity:

Held, that the covenant

not to interfere in the business was only a part of the consideration for the annuity, and was, therefore, not a condition precedent or dependent covenant.

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JEWELL

Breach, non-payment of 62l. 10s. for the quarter ending May 1, 1827.

Plea, that before the 62l. 10s. became due, *Thomas Cresswell* interfered, acted in, and intermeddled with the branch of trade assigned by him to the Defendant.

Demurrer and joinder.

Taddy Serjt., in support of the demurrer, was stopped by the Court.

Wilde Serjt. contra. The covenant by *Thomas Cresswell* not to interfere with the branch of the business he had assigned was a condition precedent to the payment of the annuity by the Defendant, and the condition not having been observed, the Plaintiff has no right of action. Wherever, as in the present case, a covenant relates to the whole consideration for the agreement between the parties, and not merely to a part of it, such covenant constitutes a condition precedent. *Duke of St. Albans v. Shore (a)*, *Campbell v. Jones (b)*, *In Gloucesterbrook v. Woodrow (c)* Mr. Justice *Le Blanc* observed, that where one party has had the advantage of all the material parts of an agreement, the other has been permitted to sustain his action for the consideration, although there might not have been a literal performance of other parts.

In *Boon v. Eyre (d)*, and *Fothergill v. Walton (e)*, the covenants on which the Plaintiffs sued went only to a part of the consideration of the whole transaction. But in the present case the material part of the agreement, if not the entire consideration on which the Defendant

(a) 1 H. Bl. 270.
(b) 6 T. R. 370.
(c) 8 T. R. 375.

(d) 1 H. Bl. 273.
(e) 2 B. Moore, 650.

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has engaged to pay the annuity, is, the undertaking by Thomas Cresswell not to interfere with the branch of business which he had assigned. The conveyance of the Scotch fishery was merely ancillary to that undertaking, and would probably have been worthless without it.

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PARK J. In this case our judgment must be for the plaintiff. Whatever confusion may prevail among the earlier cases on the subject of dependent or independent covenants, the rule seems now to be well understood, as ably and clearly laid down by Mr. Serjt. Williams in his note to *Portage v. Cole* (a); namely, "That where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant, without averring performance in the declaration." In the present case, the engagement not to interfere in the Scotch fish business formed only a part of the consideration for the Defendant's covenant. Another and most material part was the assignment of the Scotch fishery, and the case falls directly within the principle established by *Boone v. Eyre*. There, the Plaintiff having conveyed to the Defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes thereon, and having covenanted that he had a good title to the whole, and that the Defendant should quietly enjoy, the Defendant covenanted to pay an annuity to the Plaintiff on his performing every thing on his part to be performed. In an action for non-payment of the annuity, the Defendant pleaded that the Plaintiff was not, at the time of the conveyance, legally possessed of the negroes, and so had not a good title to convey:

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but the plea was held ill on demurrer; the Court of King's Bench observing, that if such a plea were allowed, want of title to any one negro would bar the action. So here, if *T. Oreswell* had sold only one barrel of fish, it might with equal propriety be urged as a bar to the present action. In *Campbell v. Jones*, the plaintiff, in consideration of 250*l.* paid, and 250*l.* to be paid by the defendant to him, covenanted to teach the defendant to bleach certain materials, and to permit him to bleach them during the continuance of a patent belonging to the plaintiff. Upon an action for non-payment of the 250*l.*, there was a special demurrer, assigning for cause that it was not averred in the declaration that the plaintiff had taught the defendant how to bleach. That the Court held, that the covenants were independent; the covenant to teach forming but one part of the consideration for the defendant's covenant to pay; the other part of the consideration being the covenant to permit him to bleach. In *Rothergill v. Walton*, the owner of a ship covenanted with the freighters to take brandy on board at *Havre*, and proceed therewith to *Terceira*, where he was to take on board a fruit or other cargo, as the freighters should load, and return therewith to *London*; the freighters covenanting to pay freight for the fruit and the brandy, and to insure a full cargo of fruit. In an action of covenant for not putting on board a full cargo of fruit, it was holden that the covenant to take brandy from *Havre* was distinct and independent; and that it was not necessary to aver performance specifically as of a condition precedent. *Dallas C. J.*, in an elaborate judgment, relied on *Boone v. Eyre* as recognised by Lord Kenyon in *Campbell v. Jones*, and by Lord Ellenborough in *Havelock v. Geddes (a)*; and I quoted what fell from

(a) 10 *Rast.* 364.

Le Blanc J. in *Glauchragh v. Woodroffe*, "the substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid; the Court held it to be no answer to an action for the annuity, to say that the plaintiff had not a good title in some of the negroes which were upon the plantation, because all the material part of the covenant had been performed; and the plaintiff had a remedy upon the covenant for any special damage sustained for the non-performance of the rest."

The substantial part of the agreement, in the present instance, is the assignment of the fishery in *Scotland*; I am, therefore, of opinion, that, according to all the cases, our judgment must be for the Plaintiff.

... *BURNHUGH J.* Upon examining the deed set out on over, I think it evident that the parties intended the covenant for payment of the annuity to be an independent covenant. The case of *Campbell v. Jones* is a most important authority, and expressly in point; for there the plaintiff having covenanted to teach the defendant to bleach, and to permit him to bleach during a certain time, in consideration of a certain sum, it was held, that as the defendant, at all events, enjoyed the permission to bleach, the teaching to bleach was not a condition precedent to the payment of the money. In that case all the previous authorities were referred to, and among them *Kingston v. Preston (a)*, where the distinction between dependent and independent covenants was so satisfactorily laid down by Lord Mansfield. I am, therefore, clearly of opinion, that *T. Cresswell's* covenant not to interfere in the business is an independent covenant.

... ..

(a) *Doug. 690.*

GASLER

..J

1827.

 CARPENTERS
 v.
 CRESSWELL

1827.
CARPENTER
v.
CRESSWELL.

CASELEE J. I am of the same opinion: the annuity to be paid by the Defendant was in consideration of two things: one, the assignment of the fishery in Scotland; the other, *Thomas Cresswell's* giving up that branch of the business. Upon the authority of all the cases, therefore, the relinquishment of the business not forming the whole of the consideration for the payment of the annuity, the covenant not to interfere must be esteemed an independent covenant. *The Duke of St. Albans v. Shore* is distinguishable from the present case, and from the others which have been cited; because the vendor of an estate having cut down the timber after he had agreed to sell it with the timber standing, the state of the premises was so entirely changed, that the vendee could never have that which he had contracted to buy.

Judgment for the Plaintiff.

Nov. 21.

GAINS v. BILSON.

Where a cause is made a remanet at the assizes, a new notice of trial is necessary.

THIS cause, after due notice of trial, had been made a remanet at the last *Leicester Spring* assizes.

Shortly after those assizes, and again shortly before the commission-day of the ensuing Summer assizes, the Plaintiff's attorney told the Defendant's attorney that he did not mean to try till the Spring assizes 1828, and he abstained from giving notice to try at the Summer assizes 1827.

Adams Serjt., upon an affidavit of the Defendant's attorney, that not having received countermand of the notice of trial given before the Spring assizes 1827, he had issued subpoenas for the attendance of witnesses at the

Summer

Summer assizes, obtained a rule *nisi* for the Plaintiff to pay the Defendant his costs for not proceeding to trial at the Summer assizes.

Taddy Serjt. showed cause, and

THE COURT, on the ground that upon a *remanet* at the assizes the Plaintiff could not go to trial without a fresh notice (though it was otherwise with a *remanet* at the sittings *(a)*, because there the record remained in the hands of the same marshal,) and that the Defendant's attorney had received full intimation of the Plaintiff's intentions,

Discharged the rule with costs.

(a) See 8 T. R. 245. *Jacks v. Mayer.*

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GAINES
BILSON

ELYIN v. DRUMMOND.

Nov. 11.

THE Plaintiff in this case had been nonsuited, (see *ante*, vol. iv. p. 278.), and on a rule for setting aside the nonsuit the Defendant gave a *cognovit* for 1s. damages, and such costs as the prothonotary should think fit. The prothonotary having disallowed the Plaintiff the costs of the trial,

Plaintiff having succeeded in setting aside a nonsuit, Defendant gave a *cognovit* for 1s. damages; and such costs as the prothonotary should think fit. Prothonotary having refused to allow Plaintiff the costs of the trial, the Court declined interfering.

Cross Serjt. moved for a rule *nisi* to review the taxation, and cited *Booth v. Atherton (a)*, and *Jackson v. Hallam (b)*, to show that the Plaintiff was entitled to the costs of the trial, contending that "such costs as the

(a) 6 T. R. 144.

(b) 2 B. & A. 317.

pro

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REYN

DAWSON.

prothonotary should think fit meant such costs as the rules of law allowed on taxation. But

THE COURT thought that the parties had made the prothonotary an arbitrator, and refused to interfere.

Rule refused.

Nov. 22.

FREEMAN V. BURGESS.

The Court refused to liberate, on motion, a discharged insolvent, who had been arrested by his surety for the arrears of an annuity accruing subsequently to the insolvent's discharge, and paid by the surety.

IN March 1825, Plaintiff became surety for Defendant in an annuity bond for the payment to *Robert Stewart* of an annuity of 65*l.* a year for the life of Defendant, secured by the covenants of Plaintiff and Defendant, and by a judgment entered up against them.

On the 4th May 1826, the Defendant was discharged from prison under the insolvent debtor's act 1 *Geo. 4* c. 119., and inserted in his schedule the consideration for the annuity, 500*l.*, as a debt due from him to *Stewart*, and also to the Plaintiff. He likewise specified a debt of 22*l.* as due from him to Plaintiff.

Stewart, upon application to the commissioners, was allowed to prove for 497*l.* The Plaintiff claimed a dividend from the Defendant's assignee, as well upon the 500*l.* as the 22*l.*, but received a dividend only on the 22*l.*

In this term the Plaintiff arrested the Defendant for 80*l.* in respect of payments of the annuity made subsequently to the Defendant's discharge under the insolvent debtor's act. Whereupon

Cross Serjt. obtained a rule *nisi* to discharge the Defendant out of the custody of the sheriff upon entering a common appearance.

Wilde

Wilde Serje, who showed cause, cited *Page v. Bussell* (a), *Welsh v. Welsh* (b), and *Flanagan v. Watkins* (c), to show that the surety was liable for arrears accruing after the insolvent's discharge; and if so, urged that the Court would not interfere on motion in favour of the insolvent. If his discharge could avail him against the surety it might be pleaded.

Cross. In *Page v. Bussell*, and in *Welsh v. Welsh*, the annuity creditors did not come in and prove their claims, and in *Flanagan v. Watkins* the bankrupt had given a bond to his surety on which the action was founded; but no bond was given by the Defendant in the present case to the Plaintiff. The insolvent acts 51 G.3. c.125. s.16. and 1 G.4. c.119. s.10. incorporate the provision of the bankrupt act 49 G.3. c.121. s.17. under which an annuity creditor is entitled to prove for the consideration of his annuity, and the bankrupt is thereupon discharged from all claims in respect of it; and the object of the insolvent acts is, equally, to protect the insolvent's person from detention. Here the grantee having proved, the grantor of the annuity is discharged as against him; and as the judgment entered up in the Insolvent Debtor's Court stands as a security against his future effects, he ought equally to be discharged as against his surety; that is, from personal detention; for, it is admitted his future effects are liable to the surety. If the law were otherwise, the grantor, after having paid a dividend to the grantee, might be arrested by his surety for the whole amount of the consideration.

PARK J. It has been admitted on the part of the Defendant that he is liable to be sued in respect of the

(a) 10 M. & S. 332.

(b) 4 M. & S. 333.

(c) 2 B. & A. 186. 1 Bing.
413.

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FIREMAN

BUNCE.

payments made by his surety since his discharge, but it is contended that there is a hardship in keeping him in custody, and the Court is asked to do that on motion, which, if it be right, the Defendant might obtain by pleading. But the Court thinks the Defendant is not entitled to his discharge; at all events, not upon motion; and there is no greater hardship in putting him to plead the proceedings under his insolvency than in requiring from a feme covert a plea of coverture. In all the cases from *Pace v. Russell* downwards, it has been holden that a person discharged under an insolvent act, or a bankrupt who has obtained his certificate, is liable to his surety for arrears paid subsequently to the discharge or certificate. In *Ellenborough v. Watkins*, where the Judges were unanimous, it was holden that the surety under an annuity deed, who had redeemed the annuity subsequently to the bankruptcy, might sue the bankrupt for the amount, although he had obtained his certificate, and although the grantor had proved under the commission; and that decision was afterwards affirmed upon argument in the Court of Exchequer Chamber. It is true that there were such cases of arrest; but in *Welsh v. Welsh*, where the surety under an annuity-deed was compelled to pay the grantor's arrears accruing after the bankruptcy of the grantor, it was holden that he might sue the grantor for the arrears so paid, and hold him to bail; and Lord *Ellenborough* said, "If the legislature intended such a case as this they have not so said, nor have they used language sufficiently clear to enable us so to say." Indeed it seems clear that the 49 G.3. c.121. had made no provision on the subject, from the circumstance that the recent bankrupt-act 6 G.4. c.16. contains an entirely new clause, by which it is provided, (s. 35.) that no person entitled to an annuity granted by a bankrupt shall sue any collateral surety for payment of the annuity until such annuitant shall have proved under

the commission for the value of such annuity; and if the surety, after such proof, pay the amount, he shall be discharged from all claims in respect of the annuity; if he do not pay, he may be sued for the accruing payments of the annuity, and after payment may stand in the place of the annuitant in respect of such proof as aforesaid.

I am, therefore, of opinion that there is no ground for this application, and that the rule must be discharged.

Denroven J. If there be any doubt on the point, it is sufficient to justify us in not acceding to the present application, for the Defendant has his remedy by pleading to the action.

Chancellor J. It has been taken for granted, on the part of the Defendant, that if the surety were to stand in the place of the grantee he would be reimbursed; but if the surety, after redeeming the annuity, should cause execution against newly-acquired effects to be issued on the judgment confessed by the insolvent, the sums raised by such execution must be distributed ratably among all the creditors. There is no ground, therefore, for relieving the Defendant on motion, and the rule must be

Discharged.

LOUKES v. HOLBEACH.

Nov. 23

WILDE Serjt., in *Trinity* term last, obtained a rule nisi to set aside an annuity granted by the Defendant to the Plaintiff. On shewing cause, *Bosanquet* Serjt. in an action to recover the arrears of an annuity cannot be heard in C. P. on a motion to set aside the annuity.



Serjt. on behalf of the Plaintiff's executors, took an objection that the Defendant had been outlawed by them in an action in the King's Bench for the arrears of the annuity, and, consequently, could not be heard in this motion; he cited *Griffith v. Middleton* (a), to shew that "it is all one to gain by way of perquisition or discharge." The Defendant had time to answer the objection till this term, and in the mean time a motion made in the King's Bench to set aside the outlawry, was discharged with costs. The Defendant was abroad (as it was sworn to be believed) by fraud to avoid legal process.

Wilde Serjt. in support of his rule, argued, that if the annuity were void, as he was prepared to shew, the outlawry could not be supported: the Defendant, therefore, ought not to be precluded from taking the first step which would enable him successfully to contest the outlawry. *Non admittitur exceptio ejusdem rei cujus petitur dissolutio.*

In cases of annuity the Court is enabled by statute, to exercise the functions of a court of equity, and in a court of equity outlawry is a suit for the same thing would not be admitted as a bar to a bill for relief. (b) In *Mitford's Pleadings* (c), that rule of equity is said to be founded on a rule of law. The case of the Defendant is one of great hardship: if he appears to reverse the outlawry, he will be taken in this suit; he cannot reverse it without shewing the circumstances under which it was effected; and if it were effected on account of his going abroad to avoid his creditors, a reversal will not be allowed; *Havelock v. Geddes*. (d) [*Park J.* referred to *Hesse v. Wood*, *contra*. (e)] The

(a) *Cro. Jac.* 425.

(b) *Bac. Abr.*, Outlawry,

(D) 3.

(c) P. 226 4th edit.

(d) 12 *East*, 622.

(e) 4 *Taunt.* 691.

outlawry

outlawry is not in this Court, and *Gilbert* says, in his *History of the Common Pleas* (a), that in an action to reverse an outlawry, another outlawry shall not be a bar. In *Griffith v. Middleton* there was an *audita querela*, which restores as well as vacates, and that explains the language of the Court, that an outlaw shall not gain by way of discharge.

Cur. adv. vult.

PARK J. This case came before the Court upon a motion to set aside an annuity for the reasons in the rule stated. This application is met by a preliminary objection, that the Plaintiff cannot be heard, for that he is at this moment an outlaw: and, therefore, till the outlawry be set aside, he can no more make this motion, than he could bring an action for any matter in which he is interested.

To this objection the Court are inclined to accede.

I am, I admit, not aware of any case in which this has been held upon a rule to shew cause. But when I find the rule to be so clearly established that a man outlawed cannot maintain any action, for by his contumacy he is out of the king's protection, and shall have no privilege or benefit from that law, of which he is a violator, and to which he refuses to be amenable, I cannot conceive how he can get the law in motion by a rule to shew cause to relieve himself from an inconvenience, any more than he can institute a suit for the recovery of his rights. It is true an outlaw may be sued; for he shall not, by his own act, prejudice others. *Glauville*, lib. 2. cap. 3. says, "*Uilegatus legem terre amittit.*" But *Britton* says, "*Respondra à tous, mais nul respondra à luy.*"

(a) P. 159.

F f 2

To

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To this point we think the case of *Griffin v. Middleton* (a) no mean authority; for though that was a proceeding in *audita querela*, yet the opinion of Lord C. J. Montague, assisted by very eminent Judges, Sir John Croke, Sir John Doderidge, and Sir Robert Houghton decided that a person *outlawed* is not *receivable* to sue in any court, unless it be to reverse his own *outlawry*; for it was said, that where it is *ad lucrandum*, there ought to be ability in the person: and it is all one to *gain by way of discharge*, as by way of *perquisition*.

In this case it is clear that the application now made for the Defendant is to gain by way of *discharge* from this annuity, which, according to these learned Judges, is the same as to gain by way of *perquisition*; that is, as by suit in an action.

The case in *Mitford* must have been that of a relator only, and not plaintiff and relator, for a mere relator cannot have *outlawry* pleaded against him. So at the common law, though an outlaw may prosecute an information for the king, yet he cannot do so if the effect be to procure a benefit not only for the king, but for himself also. This distinction was expressly taken in *Atkins v. Bayles*. (b) An information *qui tam* was exhibited against a justice of peace, for refusing to grant his warrant to suppress a conventicle, and *outlawry* in disability of plaintiff was pleaded. The Court held that though the king was interested, yet the informer only is plaintiff, and entitled to the benefit; and that though he was disabled, yet he might sue for the king, though not for himself. Judgment was given that plea was good.

But it has been pressed upon us that this person never can reverse the *outlawry*; for that though he was beyond sea, yet he had gone there by fraud and covin,

(a) *Gro. Jac.* 425.

(b) 2 *Mod.* 267.

and

and that there had been an issue on that fact. *Harlock v. Geddes*, was cited as supporting this opinion. But upon looking into the books, there is no case that supports this distinction, and the only issue in *Harlock v. Geddes* was merely whether he was beyond sea or not at the time of the outlawry.

We conceive the truth to be, that in a mere personal action, if the outlaw brings his writ of error, and assigns his being beyond sea at the time of the outlawry, the Court would make no difficulty in reversing it. The mere question will be, on what terms? And that will depend upon 4, & 5 W. 3. c. 18. s. 3. This seems settled in *Serecold v. Hampson*. (a)

But it is said, the person by coming in may be put to great personal inconvenience, even to imprisonment. With that we can have nothing to do. We think, as matters are now situated, the applicant has no *locus standi in judicio* except for one purpose, and as this applicant has not that purpose in view, therefore this rule must be discharged.

Rule discharged accordingly.

(a) 2 Stra. 1178. See *Bryan v. Wagstaff*, 5 B. & C. 314.

BOURNE v. BENETT and Others.

Nov. 24.

THE Plaintiff, who owed the Defendant *Benett* 700*l.* upon a *cognovit*, obtained a judgment against him and others, with 300*l.* damages, in an action of trespass in which *Benett* was the substantial defendant, and concerned, and bound to indemnify his co-defendants, was set off against a judgment-debt due to *B.* from Plaintiff.

F f 3

bound

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HOLBEACH

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v.

BENNETT.

1837

bound to indemnify the others to the extent of 500*l*.
Whereupon,

Rosanquet Serjt. obtained a rule nisi on the part of *Bennett*, to set off the 700*l*. and costs due on the judgment confessed by the Plaintiff against the 500*l*. and costs recovered by him in the action of trespass, which, as he urged, each of the Defendants was liable to pay separately.

Wilde Serjt., who shewed cause, objected to the want of reciprocity in the opposite claims, and contended that the Court would not allow one of many defendants to set off a judgment debt due to one of them, against a judgment debt which was due from all of them, at all events, not without securing the payment of the attorney, as was the practice in the Court of King's Bench, while the contrary practice of this Court had long ago been denounced by Lord Eldon, as standing in direct contradiction to the practice of every other court, as well as to the principles of justice. *Hall v. Ody*, (a)

Sed per Curiam. The rule must be made absolute. It is to be wished that some regulation existed for the indemnity of the attorney, but that is not the case at present, and the Court must abide by its own established practice. As to the alleged absence of reciprocity between the two claims, the practice as between *A*. and *B*. applies equally as between *A*. and *B*. and *C*. and it appears by the affidavits that *Bennett* was the person substantially responsible in the action of trespass.

Rule absolute.

(a) 2 B. & P. 28.

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S. 1. 108

S. 1. 108

Nov. 24.

STILL, Demandant; RAYMOND, Tenant;
F. LAW, first Vouchee; J. LAW, second.

THE warrant of attorney for the first vouchee was taken on the 11th *January* 1827, and his acknowledgment on the 16th at *Calcutta* (a); the second vouchee, who was only tenant for life of the estate comprised in the recovery, died on the 5th of *February* following, and there were not four returns inclusive between the return of the first writ of summons, and the death of the second vouchee.

Recovery
amended by
abridging the
returns.

Formerly five returns were required, but by 24 G. 2. c. 48. s. 8, 9. it is enacted, that writs of summons to warrant upon the appearance of the tenant to every writ of entry should and might be made and abridged to four terms inclusive; and that, in such and like cases and process, as special days had been used to be appointed and assigned for the return of writs and process, it should be lawful for the justices, in all the process by them awarded, to assign and appoint special days of returns as by them should be thought convenient.

Bosanquet Serjt. moved, that the writ of entry might be amended by being made returnable on the morrow of 10th *March* in *Michaelmas* term 1826; that the first writ of summons to warrant might be made returnable in eight days of *St. Hilary* in *Hilary* term 1827; the second, on the morrow of the Purification in that term; that the tenant's appearance might be recorded; and that

(a) The commissioners omitted thereon, and the word *sixteenth* was written on an erasure.

1897.
STILL's Case.

the recovery might pass as of that term, notwithstanding the commissioners named in the dedimus, for taking the warrant of attorney of the first vouchee, had omitted to indorse the usual return on the writ.

THE COURT thought that, under the statute, the returns might be abridged as was now prayed, and the amendment was allowed.

Fiat.

DAWLING, Demandant; SELBY, Vouchee.

The Court refused to amend a recovery by altering *Berks* into *Bucks*.

ON SLOW Serjt. moved to amend a recovery, by substituting *Bucks* for *Berks*, which had been engrossed by mistake, the deed to lead the uses describing the property as situated in *Bucks*. He relied on *Rashleigh, Demandant, Lee, Tenant (a)*, where the Court had amended a recovery, by substituting for county of *Southampton, Town* and county of *Southampton*.

Sed per Curiam. In an anonymous case in *Taunton (b)*, the Court refused to alter the county of *Derby* into the county of *Leicester*, different sheriffs being concerned; which is the good sense in such a matter. In *Rashleigh, Demandant, Lee, Tenant*, the Court considered the omission as a clerical misprision, and not as a substitution of one county for another.

Onslow

Took nothing.

(a) 4 Taunt. 355.

(b) 3 Taunt. 418.

1827.
JAMES C. SMITH

The KING v. Sheriff of LONDON, in WILSON v.
GOLDSTEIN and Another.

Nov. 27.

THE plaintiff had obtained an attachment against the
sheriff for not bringing in the body, which

An application
to set aside an
attachment for
not bringing
in the body,
should be
grounded on
an affidavit
that it is made
at the expense
of the bail.

Adams Serjt. now moved to set aside upon an affidavit,
that the application was at the instance of the bail, and
without collusion with, or indemnity from the Defendant
Goldstein.

Wilde Serjt. opposed the rule, on the ground that the
affidavit ought to have stated the application to have
been at the expense of the bail, which *Andrews* insisted
was implied in the allegation that they were not in-
demnified.

The Court made the rule absolute, but expressed a
wish that, in future, affidavits should state the application
to be made at the expense of the bail.

Rule absolute.

1829

MICHAELMAS

TERM

Nov. 23.

ROWLES v. LUSTY.

Writ of entry
sur abatement
of six mes-
suages, six
mills, &c.

Plea, that
R. S. devised
the said mes-
suages, mills,
&c., and parcel
of the land,
to T., who
devised them
to S., wife of
R. D. C., who
levied a fine to
the tenant.

The plea
concluded
with a verifi-
cation, and a
prayer of the
messuages,
&c., and land,
in the count.

The fine
set out in the
plea described
the premises
as four mes-
suages, one
cloth mill, &c.,

and the state-
ment of the fine ended with a *prout patet per recordam*.

Held, that the plea was not double:

That the prayer of judgment for the messuages and land in the count did not vitiate the plea, notwithstanding the commencement of the plea applied only to the messuages and parcel of the land:

That it was not necessary for the plea to conclude with a *prout patet*, that allegation being introduced before the conclusion: and

That the premises in the fine were sufficiently identified with those in the introductory part of the plea.

WRIT of entry *sur abatement* in the *curia* and *per* of
six messuages, six mills, six outhouses, six yards,
two barns, two stables, two gardens, two orchards, one
hundred acres of arable land, one hundred of pasture,
one hundred of meadow, one hundred of wood, one
hundred of underwood, one hundred covered with
water, and one hundred other acres in the parish of
Stonehouse in *Gloucestershire*.

Demandant stated his title as cousin and heir to
Robert Sandford, upon whose death *Robert Timbrell*
had devised to *Richard Denison Cumberland* and *Susanna*
his wife, by whom the tenant had entry.

Pleas: first, that Demandant was not heir to *R. Sandford*; and issue thereon.

Secondly, that *Timbrell* did not abate; and issue thereon.

Thirdly, as to the said messuages, mills, barns,
stables, outhouses, gardens, orchards, and thirty acres,
parcel of the said land, that Demandant ought not to
have seisin of the messuages or tenements with the land
and appurtenances in the count mentioned, or any part
thereof, because *Robert Sandford* devised the estate to
Timbrell, who devised it to *Susannah*, wife of *R. D. Cum-*

berland;

herland; and that they, in right of the said *Samuel*, became thereby seised in fee, and afterwards levied a fine with proclamations to the tenant *Samuel Lusty*. The plea concluded with a common verification and a prayer of judgment, if the Demandant ought to have his seisin of the messuages or tenements, with the land and appurtenances in the count mentioned. The premises described in the fine set out, were, *four messuages, four barns, four stables, four curtilages, four gardens, four orchards, one cloth mill, thirty acres of land, thirty of meadow, thirty of pasture, with the appurtenances, in the parish of Stonehouse in Gloucestershire.*

Demurrer and joinder.

Russell Serjt. in support of the demurrer.

The plea is double, inasmuch as it alleges two distinct defences requiring several answers, either of which would be a complete bar to the action, without the other.

1st. The devise from *R. Sandford*, from which it appears that the demandant claiming as heir can have no title.

2d. The fine levied by disseissors.

If *Sandford* devised to *Timbrell*, the demandant would have no title; and if *R.* and *S. Cumberland* levied a fine, being seised, whether they were seised as devisees, or as disseissors is immaterial to the effect of the fine. *Vin. Abr. Double Plea, A. 23, 24. 26.* It may be admitted, that if the fine could not have been stated without mentioning the devise, and the tenant meant to rely upon the fine, both might have been stated without duplicity (*Stephen, 274.*) by pursuing the proper form; but in that case the plea should have concluded by relying upon the fine. *Rastal, 277. Vin. Abr. Double Pleas, A. 67. Com. Dig. Pleader, E. 2.* But as the plea stands, if the demandant traverses the devise, he leaves

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NOTE
REMARK
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leaves a good defence upon the fine; and if he traverses the fine, he leaves a good defence upon the devise; and he cannot traverse both.

Then, though the plea sets out by specifying part only of the premises mentioned in the count, it avers that the demandant ought not to have judgment of *all*, or any part, and concludes by praying judgment of all. But supposing the tenant to have shewn a defence as to the portion mentioned in his plea, that can afford no ground for judgment as to the whole. Further, the fine, as pleaded, does not cover the premises referred to in the introductory part of it; those premises, as enumerated in the count, comprising, among other things, six messuages, and six mills, whereas the fine specifies only four messuages, and four mills. But every plea ought to contain a complete answer to all it assumes to answer in the introductory part. *Thomas v. Heathorn. (a)*

Lastly, the plea does not conclude with a verification by the record as to the fine, but with a general verification. The fine being the principal fact, the record ought to have been put in issue. *Com. Dig., Pleader, E. 29.*

Peake Serjt. contrâ. The devise is only matter of inducement, the fine is the real matter of defence, and the whole being alleged in one connected proposition there is no duplicity. *Com. Dig., Pleader, E. 2. Plowd. 140. Calfe v. Nevil. (b)* Duplicity only exists where two distinct matters, not being one entire defence, are contained in the same plea. But here the tenant's whole title constitutes his entire defence, and he has a right to set it out.

(a) 2 B. & C. 477.

(b) 1 Peab. 185.

As to the objection to the prayer for judgment, it might have been available against a plea in abatement, but upon a plea in bar, the Court may pronounce the right judgment, though the prayer be wrong. *Plowd.* 66. *Brett v. Rapillon* (a), *Bar v. Shakspear* (b), *Atwood v. Davis* (c).

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Then, the fine does apply to all the premises in the count: upon comparing the one with the other, it is manifest that the premises in both are the same, though differently enumerated; but the number alleged is never the precise number, and is mere matter of form.

With respect to the verification by the record, the learned Serjeant was relieved by the Court.

Cur. adv. vult.

PARK J. This case comes before the Court upon a demurrer to a plea to a writ of entry.

The plea on which this question arises is this: (here the learned Judge read the 3d. plea as above.)

This, it is said, is duplicity in pleading, for that either of the matters mentioned, *viz.* the devise by *Timbrell*, or the fine levied, furnishes a complete defence, and ought not to have been included in the same plea.

But we are of opinion there is no ground for this objection.

First of all, no matter will operate to make a pleading double, that is only pleaded as a necessary inducement to another allegation. I admit the rule laid down by Lord C. B. *Comyns*, that if a plea contains duplicity, and alleges several distinct matters (which require several and distinct answers) to the same thing, that would be bad. *Com.*, tit. *Pleader*, E. 2.

(a) 4 *East*, 502. (b) 10 *East*, 83. (c) 1 *B. & A.* 172.

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But no matters, however multifarious, will operate to make a pleading double, provided that all taken together constitute but one connected proposition or entire point. Try the present case by this rule, and it will be found that though there be a devise stated by *Timorel* to *Cumberland*, and a fine levied by him and his wife, they constitute but one entire proposition, one entire point of defence.

Thus (*Fin. Abr.*, *Double Pleading*, pl. 7.) to an action of assault and false imprisonment, defendant pleaded that he arrested the plaintiff on a suspicion of felony. He may set forth any circumstances of suspicion, though each circumstance may be alone sufficient to justify the arrest, for all of them taken together do but amount to one connected cause of suspicion.

The true rule in pleading, I take to be this, that duplicity is, where two distinct matters, *not being part of one entire defence*, are attempted to be put in issue. But this can never apply to, nor does it ever preclude a party from introducing several matters into a plea, if they are constituent parts of the same defence.

For though it be true that issue must be taken on a single point, yet it is not necessary, nor ever can be, that such single point must consist only of one single fact. This is well illustrated by the case of *Robinson v. Raley*. (a)

To an action of trespass Defendant had pleaded amongst other things a right of common. Plaintiff in his replication traversed, that the cattle were the Defendant's own cattle, that they were *levant* and *couchant*, and that they were *commonable* cattle. To this there was a special demurrer, * that the replication is multifarious, and that several matters (specifying them) are put in issue, whereas only one single matter ought to be so.

(a) 1 Barr. 316.

Lord Mansfield's judgment upon this point is:—

"The substantial rules of pleading are founded in strong sense, and in the soundest and closest logic; and so appear when well understood and explained; though by being misunderstood and misapplied they are so often made use of as instruments of chicanery."

"As to the present case, it is true you must take issue upon a single point, but it is not necessary that this single point should consist only of a single fact. Here the point is the cattle being entitled to common; this is the single point of the defence. But, in fact, they must be both his own cattle, and also tenant and commoner, which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite."

We are, therefore, of opinion, that there is no duplicity in this case; the Defendant has chosen to set out his whole title, which, though it may consist of several matters, conduces to one common end, viz. a complete bar, if true, to the claim of the Plaintiff.

The second objection in this case is, that the introduction to the plea selects a part, and yet concludes as to the whole. To which the Court answers that this prayer to a plea in bar may be set right. In *Brett v. Papillon* (a), Lord Ellenborough said, "in many cases judgment has been entered up according to the right appearing in favour of the plaintiff on the whole record, notwithstanding an issue on a bad plea in bar found against him. The Court in 2 *Sira* 1055. and *Rep. temp. Hardw.* 345. held expressly that they were not bound by the prayer of an improper judgment, and, therefore, pronounced the rule, that the plaintiff in error should be barred, contrary to the terms of defendant's prayer, that the judgment might be affirmed."

(a) 4 *Rast*, 509.

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The first objection is, that the fine is not a declaration of the Court, as in *Shakespeare* (4), *Henderson* (5), and *High* (6), which is a distinction between a plain and a secret plea in abatement; in the former the party might not sign judgment on a wrong prayer, but not in the latter."

Another objection is, that the fine as pleaded does not cover all the premises alluded to in the declaration or plea mentioned; for that the plea in its introductory part speaks of *six* messuages, whereas the fine speaks only of *four*.

But the plea states that the fine was *letted* (of *the*) *the* messuages in the introductory part of the said plea mentioned, and the land whereon the said building now stand, by the *description of four messuages, &c.* Therefore we say that will be a matter of fact to be proved by the evidence, whether this allegation be true.

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The fourth objection is, that this fine was *letted* by the record. This argument is not strong, for after setting out the fine the plea says, "as by the said fine and proclamations made thereon now witnessed in the said Court of the Bench more fully appears." But it is said this averment ought to have specified the conclusion of the whole plea. It seems to me, however, this would have been the case for the fine does not constitute the whole of the plea. It is made up of several distinct matters though concluding to one point, viz. the *Replevin*. Therefore the conclusion to the Court is not the whole matter; and though one of the matters is upon the fine, which is verified by the record in its proper place, yet it would not have been so if the whole matter of the plea was verified by the record, which

(4) to East, 83. (5) 1 B. & C. 174. (6) 1 B. & C. 174. VI. 207

as part of that plan, the advice of Sir James Clerk,
which does not appear by any authority of record.

For these reasons we are all of opinion that judgment
ought to be given that the submission is valid.

Defendants;

Plaintiff.

THE COURT OF SESSION.

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McDougal v. Robertson and Another.

Nov. 27.

(In Error.)

THIS was an action brought by the Defendants in
the Court, against McDougal, the Plaintiff in error, and
his heirs.

The declaration stated the single bond.

By the condition which was afterwards set out set
out, it appeared that a deed of submission or reference
in the Scotch form had been made at Glasgow, between
the *Reverend* Morrison and the Defendants in error; the
Plaintiff in the action, referring all matters in difference
between them to the award of two persons named, and
instantly they differed, to an umpire; and as the condition
stated, they bound themselves, their heirs, executors,
and administrators, to fulfil the award under a penalty
of £5000.

The condition of the bond did not recite all the pro-
visions contained in the submission, but referred to
other provisions, declarations, and agreements therein
particularly specified and set forth.

Then it went on to provide that if Morrison, his
heirs, executors, administrators, and successors, should

A submission
to arbitration
contained a
stipulation
that it should
not be vacated
by the death
of either of
the parties,
but that, not-
withstanding
such an event,
matters should
be proceeded
in.

The final
award having
been made
after the death
of one of the
parties: Held,
that a surety
for the fulfil-
ment of it was
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truly fulfil all *Morrison's* covenants and agreements in the submission in part recited, particularly if he or ~~they~~ should pay all sums directed to be paid either by any interim decree, or by any final decree, then it was to be void, otherwise to remain in force.

M'Dougal pleaded first, *non est factum*.

The second plea stated the deed of submission at large, and particularly a clause which raised the argument. "Declaring always, as it was thereby expressly provided and declared, that the said submission should not vacate or expire through the decease or insolvency of either of the parties, but should notwithstanding such an event be proceeded in, and the matters at issue determined in the same manner as if such an event had not occurred." It then proceeded to state as to all excepting the final award, that *Morrison*, his heirs, executors, administrators, and successors, did every thing which by the said deed of submission they were bound to do, and as to the residue not excepted, that no final decree was made.

The third plea, as to all except what regarded the money directed to be paid, or penalty directed to be paid, alleged performance by *Morrison* in his lifetime, and his heirs, executors, and successors, after his death, and as to the part excepted, that no sum and no penalty was directed to be paid.

The fourth plea began by excepting what was excepted in the introduction to the second plea, which related to a final award, and then pleaded that *Morrison*, his heirs, &c. did perform every covenant in the said deed or instrument of submission as to all interim orders; and then as to what was excepted, namely, as to a final decree; that after the making the said deed, or instrument of submission, and before the arbitrators gave forth, pronounced, or made any final award, order, arbitrament, sentence, decree arbitral, final end and deter-

determination, and before the umpire or oversman gave forth, pronounced, or made any umpirage under or by virtue of the said deed or instrument of submission, to wit, on the 7th October, in the year 1823, the said *Aeneas Morrison* died.

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The fifth plea alleged that *Aeneas Morrison* died before any decree arbitral either interim or final.

The course which the argument took, makes it immaterial to pursue the other pleas.

To the second and third pleas, the Plaintiffs below in their replication stated all the proceedings under the submission down to a final award, by which *Morrison's* executors were directed to pay a sum of 1500*l.*, and to deliver up a certain letter of credit, or pay 500*l.*, averring that all these proceedings were valid according to the law of *Scotland*. And then alleged the breaches in not paying the 1500*l.*, and in neither delivering up the letter of credit, nor paying the 500*l.*, which was the alternative.

The Defendants rejoined, protesting that the submission was revoked by the death of *Morrison*; and averred as to the non-performance of the final award, that *Morrison* died insolvent.

The Plaintiffs thereon demurred. The material ground of the demurrer was that clause in the deed called the submission, by which it was expressly provided that the submission should not vacate or expire by the insolvency of either of the parties.

The Defendant joined in demurrer.

To the fourth plea, the Plaintiffs in the action demurred, and for cause of demurrer showed that by the submission in the fourth plea mentioned, it was expressly provided that the submission should not expire by death of either of the parties. The Defendant joined in this demurrer.

To the fifth plea, which in substance relied upon the

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death of *Morrison* before any award interim or final, the Plaintiff demurred, and showed for cause, the express provision in the submission that it should not vacate or expire through the decease of either of the parties, but should, notwithstanding such an event, be proceeded in.

The Defendant joined in this demurrer. This was the substance (as far as it is material to state them) of the pleadings.

Brodrick for the Plaintiff in error. The fourth and fifth pleas containing no reference to the second and third, which set out the stipulation for the validity of the award notwithstanding the previous death of either of the parties, the only question on the fourth and fifth pleas is, whether if the death of one of the parties to a submission be a revocation of the arbitrator's authority, a surety for the performance of an award is liable in respect of its non-performance where the award has been made subsequently to such death.

That the death of one of the parties previous to the award operates as a revocation of the arbitrator's authority is clear from *Vynior's* case (a); even where the authority is created by order of *Nisi Prius* after verdict taken for the plaintiff; *Potts v. Ward* (b); *Toussaint v. Hartop* (c), *Cooper v. Johnson*. (d) In like manner the marriage of a woman is a revocation of a submission made when she was sole; *Charnley v. Winstanley*. (e)

If, then, the authority be revoked, can the surety be called on to do that which, if the executors of the party to the submission had done, they must have done on their own account, and could never have charged against the assets of their testator? The surety is only liable to perform what ought to be performed under the deed

(a) 8 Rep. 82 a.
(b) 1 Marsh. 366.
(c) 7 Taunt. 571.

(d) 2 B. & A. 394.
(e) 5 East, 266.

of submission; but if the executors of the party were not bound to do any thing under that submission, why should the surety? he cannot be liable except in respect of a refusal to fulfil a strict legal obligation. *Arlington v. Merrick* (a), *Weston v. Barton*. (b)

Upon the demurrer to the rejoinder to the replication to the second and third pleas arises the question, Whether a covenant to perform an award made after the death of one of the parties to a submission can be enforced? But such a stipulation is incompatible with the nature of a submission, which cannot by any means be extended beyond the life of the party. Such a submission is revoked by the death of the party, just as a power of attorney. *Litt. s. 66*. A letter of attorney to deliver livery of seisin after the death of the feoffor is void. *Cq. Litt. 52 b.*; *Roll. Abr. Feoffment, 1.*; *Bac. Abr. Authority*, (E). So payment to an attorney after the death of the principal. *Wallace v. Cook*. (c)

Robt. v. Tyndal (d), *Tyler v. Jones* (e), and *Clarke v. Crofts* (f) are distinguishable. The first turned on a copyhold custom, which is equivalent to a law; and in the two latter the authority was not by act of the parties, but by rule of court, and that, after a verdict had been taken for a sum certain. *Dowse v. Cox* (g) has been reversed on error. (h)

The executors of the party, therefore, would not have been liable to perform an award executed after his death, notwithstanding an express stipulation to that effect; and if the executors would not be liable, the surety could not be called on to do more than his principal.

(a) *2 Wils. Sess. 434*. B. 4.

(b) *4 Taunt. 673*.

(c) *3 Esp. 117*.

(d) *Styl. 423*.

(e) *3 B. & C. 144*.

(f) *4 Bingb. 143*.

(g) *5 Bingb. 20*.

(h) *6 B. & C. 255*.

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Complete, contra, relied on *Tyler v. Townsend & Glavin v. Crofts*, contending that there was no substantial distinction between a submission by act of all the parties and a submission under a rule of court or order of the Court. *Donse v. Cox* was reversed solely on the ground that the attorneys in the cause could not submit into a valid submission for certain infants, who were parties of the cause.

ALEXANDER C. B., after stating the pleadings as above, proceeded to deliver the judgment of the Court. Two questions have been principally argued, one of which is a question on the merits; the other appears to me to be of form only, but upon which it depends whether the Court can get at the merits.

The question upon the merits is, Whether the award is invalid, because some of the proceedings were had, and the award itself was made after the death of *Morrison*, one of the submitting parties? What I consider as a question of form is, Whether the pleadings have been so managed on the part of the Defendants in error, that the Court can take notice of that clause in the submission, which does not intend to preserve the validity of the award, notwithstanding the death of *Morrison* before it was made.

The argument has mainly arisen on the second and third pleas, and on the fourth and fifth pleas, together with the subsequent parts of the record applicable to those pleas. The fourth and fifth pleas, and the subsequent pleading applicable to them, is what first calls for our attention.

The fourth and fifth both say the award is invalid, because *Morrison* died before it was made.

The Defendants in error say by their demurreurs that fact is indifferent, because there is an express provision

in the submission, that the authority should not expire by death. In order to shut out this clause by the form of the pleadings, it is said that those pleas and the demurrers to them, must be treated and considered as if (no other pleas had appeared on the record, and that no facts can be transferred from any other part of the record, in order to enlarge the statement or supply the deficiencies of these particular pleas; and that, therefore, inasmuch as no part of the instrument of submission is stated either in the fourth or fifth pleas, it follows of course that it does not appear upon these pleas or that part of the record connected with them, that the deed of submission contains any agreement or clause like that relied upon, namely, that it should not be vacated by the death of either of the parties before the award.

The consequences of which would necessarily be, that the award should be void by the general law, as being made after the death of one of the parties.

If these premises were true, the conclusion would soon follow. But are they true? We think not. Admitting, that in ordinary cases you cannot transfer to one part of the record what is stated in another, yet if that plea or part of the record which appears deficient does itself refer to another which supplies that deficiency, then we may avail ourselves of such reference.

Now here there is such a reference. The second plea contains the deed of submission at large, with the clause in question in it.

The fourth and fifth pleas now under discussion, do refer to the second plea and the deed of submission. The fourth plea begins by excepting what is excepted in the introduction to the second plea, (by mistake it is called the first, where there is nothing excepted,) then it proceeds to say, that *Morris* in his lifetime, and his heirs, &c. did perform every covenant, clause, and agree-

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ment specified in the said instrument, by which the said plaintiff, his heirs, and assigns, have agreed to and do to any interim decree, and as to the residue which he before excepted, he says, that after making of the said deed of submission of submission, and before any final award, Morrison died. Now here is an express reference to the introduction to the second plea, in which the submission is found, and an express reference to the deed of submission, which is to be found at where else except in the second plea. All these come into clear reference to the submission, as stated in the second plea; and the Court thinks such reference warrants the Defendants in error in their demand that such plea, to refer to the provision in the submission, as stated in the second plea, which provides that it shall not expire by the death of either of the parties. In such a way we think, that we are, upon the particular circumstances of this case, relieved from those difficulties which it has been contended the rules of pleading oppose to our getting at the real merits of the case. This brings me to that question. It is, Whether the clause inserted in the submission, is vain and nugatory, whether, if parties so stipulate, an award is not void, though made after the death of one of them? (1871) 20 Cr. 187. It does not appear to the Court that many cases have been cited in support of the proposition, that an award is void, if made after the death of one of the parties. I need not doubt, that where there has been express stipulation upon the subject, the act or death of a party will revoke the authority given to an arbitrator, and render an award made after, null and void. But the question here is, whether the parties can so stipulate, so as to bind themselves, so as to make an award made after the death of one of them, valid and effective. I think it is perfectly established, that it is not so. It is somewhat curious to trace the history of this practice upon this subject. In

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effectual according to the law of *Scotland*. That fact is not traversed as it might have been, therefore it is admitted.

It stands admitted upon those pleas, and the replication to them, and the subsequent pleading upon that part of the case, that by the law of *Scotland* all these proceedings under the submission are valid by the law of *Scotland*.

We all agree in thinking that the judgment must be affirmed.

Judgment affirmed.

END OF MICHAELMAS TERM.

NET 2/11/07 14:14

21. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572. 2573. 2574. 2575. 2576. 2577. 2578. 2579. 2580. 2581. 2582. 2583. 2584. 2585. 2586. 2587. 2588. 2589. 2590. 2591. 2592. 2593. 2594. 2595. 2596. 2597. 2598. 2599. 2600. 2601. 2602. 2603. 2604. 2605. 2606. 2607. 2608. 2609. 2610. 2611. 2612. 2613. 2614. 2615. 2616. 2617. 2618. 2619. 2620. 2621. 2622. 2623. 2624. 2625. 2626. 2627. 2628. 2629. 2630. 2631. 2632. 2633. 2634. 2635. 2636. 2637. 2638. 2639. 2640. 2641. 2

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS.

IN

Hilary Term,

In the Eighth and Ninth Years of the Reign of
GEORGE IV.

MEMORANDA.

ON the 28th *January* Sir Charles Wetherell was appointed his Majesty's Attorney-General in the room of Sir James Scarlett.

Lord Chief Justice *Best* was prevented by severe illness from attending in Court subsequently to the 3d of *February*.

1898.

Doe dem.

TIT.

Jan 23.

NOTTAMPTON.

Where a tenant entered under an agreement for a lease for seven years, which was never executed: Held, that he was not entitled to notice to quit at the end of the seven years.

THE lessor of the Plaintiff had entered into an agreement to grant the Defendant a lease of the premises described in the declaration, for seven years, to commence on the 29th of September 1820. The lease was never executed, but the Defendant occupied the premises, and paid the rent which was to have been reserved by the lease. On the 29th September 1827, the Defendant having received no notice to quit, refused to deliver up the premises to the lessor of the Plaintiff, whereupon the present action was commenced.

At the trial before Best C. J., *Middlesex* sittings after *Michaelmas* term last, a verdict was taken for the lessor of the Plaintiff, with liberty for the Defendant to move to enter a nonsuit, if the Court should be of opinion that he was entitled to notice to quit.

Jones Serjt. accordingly now moved to enter a nonsuit, on the ground that the Defendant held as a mere tenant from year to year, and as such, was entitled to notice to quit. He admitted, that though a tenant who holds under an agreement for a lease might be said to hold under the terms of the lease, as to rent and repairs, &c., yet, if the lease were never executed, he must also hold subject to all the incidents of a tenancy from year to year, and would only so far be bound by the terms of the lease as was compatible with such incidents. *Hamerton v. Stead* (a), *Mann v. Lovejoy*. (b) If it were otherwise, the parties would be on unequal terms; the landlord having the benefit of the stipulations contained

(a) 3 B. & C. 478.

(b) 1 Ryan & Moody, 356.

in the lease, and the tenant not having the seven years' interest in the term.

BEST C. J. **JOHNSTON** We should multiply notices to quit unnecessarily if we held that this action did not lie. Within the seven years the Defendant could not have been turned out without notice; but at the end of the seven years the contract itself gives him sufficient notice. The point is, in effect, decided in *Doe dem. Bloomfield v. Smith (a)*, and *Doe dem. Oldershaw v. Breach (b)*, and need not be argued. **JOHNSTON** concurred.

JOHNSTON During the seven years notice would have been necessary, but not at the end of that period.

JOHNSTON Notice was not necessary in this case, nor does the agreement give one party any advantage over the other.

Rule refused.

(g) 6 East, 520. (b) 6 Esp. N.P.C. 106.

As a result of the investigation, the following conclusions were reached:

1. The investigation of the accident was conducted in a timely manner and the results were made available to the public in a timely manner.
2. The investigation of the accident was conducted in a timely manner and the results were made available to the public in a timely manner.
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1828

23rd Feb

January

SCALES V. PROPERING.

By s. 34. of a private act of parliament, a water company was empowered to "break up the soil and pavement of roads, highways, footways, commons, streets, lanes, alleys, passages, and public places," provided (s. 34.) that they should not enter any private lands without the consent of the owner: Held, that the company had no authority, without the consent of the Plaintiff, to enter a field of his, over which there was a public footpath.

BY 47 G. 3. sess. 2. c. 72., "An act for better supplying with water the inhabitants of the parish of *Stratford le Bow*," and several other parishes, hamlets, townships, and places adjacent, the company of proprietors of the *East London Water-works* are empowered (section 32.) by themselves, their deputies, officers, agents, servants, workmen, and assistants, to make, complete, and maintain water-works, aqueducts, reservoirs, water-wheels, steam-engines, and other engines, pipes, and other works necessary for the purposes of that act, in the parishes, places, &c. therein named; and to supply the same with water from the river *Lee*, and to make such and so many feeders, tunnels, and shafts, and to make, erect, and set up such and so many sluices, weirs, engines, steam-engines, and other machines for supplying the said water-works with water, and for any other purposes for the making, maintaining, and using of such water-works as they, the said company, and their successors shall from time to time think proper and expedient.

And for the purposes of distributing such water to the different inhabitants, and effectuating the several purposes of the act, "it shall and may be lawful to and for the said company of proprietors and their successors, and to and for their agents, officers, workmen, and servants, to dig and break up the soil and pavement of any of the roads, highways, footways, commons, streets, lanes, alleys, passages, and public places within, adjacent, and near unto the said parishes, townships, hamlets, and places, and to sink and lay pipes, trunks, and other conveniences for the purposes aforesaid."

"Provided

"Provided always (section 34.), that nothing in this act contained shall authorise or empower the said company of proprietors, or any other person or persons acting by or under their authority, to make any aqueduct, tunnel, feeder, or other works for the supply of water, across or over, or to enter into or upon the *private lands and grounds* of any body soever, *without the consent of the owner or owners, proprietor or proprietors, and occupier or occupiers thereof, or into or upon any commons, commonable lands or fields, or waste lands, without the consent of the lord of the manor or other owner or owners thereof.*"

By section 41., after reciting that a map or plan, describing the places where the reservoirs were to be made, had been deposited with the clerks of the peace for the counties of *Middlesex* and *Essex*, it was enacted, "that such map or plan should remain in the custody of the clerks of the peace for the time being; that persons interested should have liberty to inspect and copy the same;" and "that the said company *shall not make any other reservoir or reservoirs, aqueduct, feeder, or tunnel, or have any right or authority to take any other land for making any other reservoir or reservoirs, or for making any aqueduct, feeder, or tunnel for the supply of any water, than the reservoir or reservoirs, aqueduct, feeder, or tunnel in the said map or plan described, nor, in making the said reservoir or reservoirs, aqueduct, feeder, or tunnel, deviate more than twenty yards or three feet each from the place or places, line or course described in the said map or plan, without the consent in writing of the person or persons, body or bodies politic or corporate, in, or through, or upon whose lands any such reservoir or reservoirs, aqueduct, feeder, or tunnel shall be erected or made.*"

The Plaintiff being possessed of a field in one of the parishes mentioned in the act, over which there was a public

1822.
 SOALES
 v.
 PROCTOR.

1888.
SCOTT
v.
BACKHOUSE.
public footway, the Defendant, on the part of the company, entered it without the Plaintiff's consent, dug up the soil for the purpose of laying the company's pipes, destroyed the fences, and otherwise did considerable damage. The Plaintiff thereupon brought the present action, on the ground that there was nothing in the above act to authorize such a proceeding without his consent.

At the trial before *Best C. J.*, *Middlesex* sittings after *Trinity* term last, a verdict was taken for the Plaintiff, with leave to the Defendant to move to set it aside if the Court should be of opinion that the statute authorized the Defendant on the part of the company to proceed without the Plaintiff's consent. The Chief Justice, however, was clearly of opinion that it did not. The plan required by the forty-first section was not produced.

Wilde Serjt., on the part of the company, having obtained a rule *nisi* to set aside the verdict, on the ground that the Defendant was authorized by the act to enter the Plaintiff's close without his consent, the close being traversed by a public footway,

Taddy Serjt., who showed case, relied on the proviso in the thirty-fourth section, as restraining the operation of the thirty-second, and contended that even in the thirty-second the word *footway* ought, from the context, to be taken to mean a paved footway in a town, and not a mere path over a private field, the object of the section being the distribution of water among the inhabitants of a town district. The Defendant, too, ought to have shown that he had not deviated from the plan required by the forty-first section.

Wilde. Whenever a power is given, the means of exercising it are given at the same time: but the water
could

could not be distributed, unless it were first conveyed to the spot; and as to the assistance to be derived from the context, the next word to *freeway* is *conveyed*, which shews clearly, that the powers of the company were not to be confined to the streets of a town. Besides, the object of the act was manifestly to supply with water a new and increasing district, and it was convenient to lay down the pipes before the streets were paved and finished. The forty-first section applied only to reservoirs, and matters connected with them; for a plan of the situation of the pipes could not be made before the houses were erected, the position of each branch-pipe depending upon the structure of each house. But that section shewed that a supply of water was to be secured, which was to be distributed under the powers of the thirty-second; and such distribution would be impossible unless the company were authorized, without the consent of the owner of the soil, to place their pipes under any kind of public way between the reservoirs and the houses: the power, if not conferred by the present act, must be obtained by another application to parliament.

BART. C. J. I entertain not the least difficulty on the construction of this act; but as it was said the company could not go on without a fresh application to parliament if the point were determined against them, I reserved it for the consideration of the Court. What is the case? The public has no other right over the field of the Plaintiff than to pass along it in a certain track; subject to that, it is the absolute property of the Plaintiff. The Defendants, nevertheless, have entered his field, have prostrated his fences and banks, and after doing much other injury, have laid down their pipes, which will require frequent repair, and fresh disturbance of

1828.

SCALES

v.

PICKERING.

the soil. But the Defendants have no right to take the Plaintiff's soil without compensation, and the legislature has wisely provided that such compensation shall be paid beforehand; for if it were otherwise, bankrupt companies might enter upon any man's land idly, on schemes which they could not afterwards pay for. They who enter in such cases must clearly show their authority; and if the words of the statute on which they rely be ambiguous, every presumption is to be made against the company and in favour of private property. If such a construction were not adopted, acts would be framed ambiguously in order to bring parties into security. It is clear, however, that under the thirty-second section of this act the company has no power, without the consent of the owner, to enter on property for the purpose of carrying their pipes over a district of country before they come to the place of distribution, but only to enter for the purpose of distributing the water; and constraining the word *footway* from the company in which it is found, *namely* "the soil and pavement of," "streets," "lanes," "passages," — the legislature appears to have meant those paved footways in large towns which are too narrow to admit of carriages and horses. This is the construction I should put on the clause without referring to the proviso in the thirty-fourth section, but that section must be considered as forming part of the thirty-second, and the office of a proviso is to restrain the operation of the enacting clause. The proviso expressly excludes footways over private grounds, which, as well as commons, are not to be entered for the purposes of the act without the consent of the owner or the lord of the manor. The thirty-second section, therefore, applies only to footways where there is no private owner of the soil; and the Plaintiff is entitled to retain his verdict for the unauthorized act of the Defendant.

PARK

PARK J. I am clearly of opinion that there is nothing in the case. It is a wise rule in the construction of private acts of parliament that they should be construed strictly. The word *footway* here, *nosctur a sociis*, in which there is no reference whatever to private rights. "*The soil and pavement of footways, commons, streets, lanes, alleys, passages, and public places.*" Section 32. must be read as part of the same clause as section 34.; and under the proviso in section 34. the company are not only not to make any work for the supply of water, but are not to enter into any private land without the consent of the owner. The word *commons* evidently refers to those small patches of waste land sometimes lying by the side of a road, the property of which belongs to the lord of the manor; and where that is known to be the case, his consent is to be obtained.

1828,
 SEALD
 or
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BURROUGH J. Looking at the general purview of the act, and the context, it is clear that the word *footway* means one of those paved ways running by adjacent buildings, and not a path over a private ground.

GAGLEEE J. I think it clear that the company is not entitled to enter a private ground without the consent of the owner. The rule must be

Discharged.

1828.

Jan. 26.

BURDEN v. HALTON.

The Defendant had given the Plaintiff bills for goods, which bills had been transferred to a third person; but at the time of the trial of an action for the value of the goods, though not at the commencement of the action, they were again in the Plaintiff's hands overdue and unpaid by the Defendant: Held, he was liable, notwithstanding he had given the bills.

THIS was an action brought to recover 237*l.*, alleged to be due from the Defendant for embroidery. At the trial of the cause before *Burrough J.*, *Middlesex* sittings after *Trinity* term, it appeared in evidence, that the Defendant had accepted two bills drawn upon him by the Plaintiff in respect of the account between them, one for 100*l.*, and another for 146*l.*; that these bills had been transferred by the Plaintiff to merchants in the city; but that after the commencement of the action, though before trial, they were again, without any money having passed, placed in the Plaintiff's hands, where they remained at the time of the trial, overdue and unpaid by the Defendant. It was objected by the Defendant's counsel, that on this proof the Plaintiff should be nonsuited, inasmuch it did not appear that the bills had been paid by the Plaintiff, and the Defendant might still be liable on them. The learned Judge overruled this objection, and directed the jury, that as the Defendant had not paid the bills, and they were again in the Plaintiff's hands, the circumstance of their having been in the hands of a third person amounted to nothing, and could not affect the Plaintiff's right to recover.

Jones Serjt. now moved for a rule *nisi* to enter a nonsuit or have a new trial on the above objection. He cited *Kearslake v. Morgan* (a), and *Dangerfield v. Wilby* (b), to shew that a party to whom a bill or note has been given in respect of a debt must prove that

(a) 5 T. R. 513.

(b) 4 Esp. 159.

the debtor is no longer liable on the instrument, before he can sue on the original consideration. That at the time this action was commenced, the only time to which the Court could look, the Defendant was clearly liable on these bills, they being then in the hands of a third party, and not taken up by the Plaintiff.

1828.
BURDEN
v.
HALTON.

BEST C. J. There is no evidence of these bills having been transferred to the indorsees for consideration, and they were sent back to the Plaintiff without any money passing. The authorities shew, that if the bills had remained in the hands of third persons, that would have been a defence to the action, because the Defendant might have been called on to pay them: but as they were in the hands of the Plaintiff, and overdue at the time of the trial, that could never happen.

Rule refused.

BENSON v. HIPPIUS.

Jan. 28.

BY charter-party of *March* 1825, between the Plaintiff, owner of the ship *Trusty*, and *B. T. Gillam*, the ship was to proceed to *Quebec* to load a cargo of timber, &c. and proceed therewith to *London*. "Fifty running days were to be allowed for loading the ship at *Quebec*, and unloading in *London*, and ten days on demurrage, over and above the said laying days, at 10*l*. The charterer of a ship having consigned his cargo to *P.*, who placed it in Defendant's hands to sell it, the Defendant, by an agreement which stated

those facts, undertook to pay Plaintiff, the owner of the ship, freight and demurrage, if any were due, and in every respect to put himself in the place of the charterer.

Fifty running days were allowed by the charter-party for loading and unloading, and ten for demurrage, at 10*l*. a day. The ship having occupied ninety-five days in loading and unloading, several of which elapsed after the date of the Defendant's agreement: Held, that he was liable in damages in respect of demurrage for the whole, and that a sufficient consideration appeared on the face of the agreement.

H b 3

per

1825.

Benson

Hippus.

per day. Penalty for non-performance of the agreement, 3000*l*."

The ship having taken in her cargo at *Quebec*, returned to *London*, *Gillam* having consigned the cargo to *Pirie* and Co. on payment of freight as per charter-party; and on her arrival, the Defendant addressed the following letter to the Plaintiff, who refused to deliver the cargo without the undertaking contained in the letter.

London, Sept. 21. 1825.

Mr. *Thomas Benson*,

Sir, — Messrs. *John Pirie* and Co., the consignees of your ship *Trusty's* cargo, having placed it in my hands for sale, I hereby engage to pay you the freight, primage, and demurrage, if any be due, and in every respect to put myself in the place of Mr. *Gillam*, the charterer, so far as respects the agreement made with you for the *Quebec* voyage.

C. J. HIPPIUS.

Ninety-five days having been occupied in loading and unloading instead of fifty, the Plaintiff sued the Defendant on this undertaking for damages in respect of forty-five days' demurrage, several of which days had elapsed subsequently to the date of the above letter.

The declaration, after setting out the charter-party, stated the voyage out and return of the ship to *London*, that she was ready to discharge her cargo in the docks, and that *Pirie* and Co., to whom the cargo was consigned, had requested the Defendant to sell it for them; that the Defendant thereupon, in consideration that the Plaintiff, at Defendant's special instance, and request would deliver to him the cargo according to the terms of the charter-party, undertook and promised the Plaintiff to pay him the freight, primage, and demurrage for the same, if any should be or become due, and

and in every respect to put himself in the place of the charterer of the ship, so far as respected the agreement made with the Plaintiff for the said voyage; that the ship was detained in loading and unloading fifty days above the fifty running days in the charter-party mentioned; that 100*l.* thereupon became due for ten of the fifty supernumerary days for demurrage, according to the terms of the charter-party; and that the Plaintiff for the detention of the ship forty days, residue of last-mentioned fifty days, deserved to have of the Defendant according to his undertaking 400*l.* more. Breach, non-payment.

The Defendant pleaded the general issue, and paid 100*l.* into Court.

At the trial before *Gaselee J.*, *London* sittings after *Michaelmas* term, the jury found a verdict for the Plaintiff 300*l.* damages beyond the 100*l.* paid into Court, the Defendant having leave to move to enter a nonsuit upon certain objections to the declaration.

Taddy Serjt. now moved accordingly, upon the ground,

First, that this was an undertaking by the Defendant for the debt or default of another, and that no sufficient consideration moving from the Plaintiff to the Defendant appeared on the face of the agreement, — *Wain v. Warlters* (a), *Saunders v. Wakefield* (b), — inasmuch as the Plaintiff was not the person who placed the cargo in the Defendant's hands, nor had he any lien on it, if, as according to the language of the agreement, it was already in the hands of the Defendant.

Secondly, that the consideration, if any existed, was not correctly stated as being that Plaintiff *would* deliver, when the writing purported that he *had* delivered.

(a) 5 *Burr.* 201.

(b) 4 *B. & A.* 595.

1888,

Bryant

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Thirdly, that the Defendant was only liable for demurrage under his agreement, and not for tortious detention by the captain or others, more particularly subsequent to the date of the Defendant's letter. The ten days during which the ship had been occupied beyond the fifty running days gave rise to a claim for demurrage to which the charterer might have been liable under the charter-party, and the Defendant, perhaps, under his agreement; the remaining thirty-five days were taken up by a detention for which, upon this declaration, the Defendant was not answerable, either according to the terms of the charter-party or of his agreement.

BEST C. J. It has been objected to the Plaintiff's recovering in this case, that in the agreement which is the ground of the action there is no consideration moving from the Plaintiff to the Defendant, and that, therefore, the action does not lie. But from the Defendant's letter of the 21st of *September*, which constitutes the agreement, it appears, that the Plaintiff was owner of a ship, the cargo of which had been consigned to *Pirie and Co.*, and that they had authorized the Defendant to sell it; the Defendant, who could not sell it without the consent of the Plaintiff, in order to obtain that consent undertakes to pay demurrage on the ship, if any be due. There is a sufficient consideration moving from the Plaintiff. It has been argued, indeed, that demurrage only could be recovered under the charter-party, and that the Defendant cannot be sued for the detainer of the ship, especially for that which occurred subsequently to the date of the Defendant's letter. But the Defendant undertakes not only to pay the freight and demurrage due from *Pirie and Co.*, but in all respects to put himself in the place of *Gillam*, the charterer, so far as respects the *Quebec* voyage. Now there can be no doubt that *Gillam* was bound

bound for all detention beyond the fifty running days allowed by the charter-party. Detention and demurrage mean the same thing.

Rule refused?

1828!
BENSON
&
HIPPON.

SRAGO v. DEANE.

Jan. 28.

THE Plaintiff declared, that in consideration she, at the request of the Defendant, would become tenant to the Defendant of a house and premises in *Surry*, at a yearly rent of 39*l.*, under a lease thereof, to be granted to her by the Defendant, the defendant undertook and promised to pay her the sum of 20*l.* to repair the house; and also that he would make an opening from the cellar of the house into *Wandsworth Lane*, and put three stone steps from the cellar, and make a door in the house to open into *Wandsworth Lane*, to enable Plaintiff to take out coals from the cellar:

That Plaintiff became tenant of the house, &c. to the Defendant, at the rent aforesaid, under a lease granted to her by the Defendant; but that though a reasonable time had elapsed and a request had been made to the Defendant to perform his agreement, he had never given the Plaintiff the 20*l.* to repair the house, nor had he made the opening from the cellar, nor put steps, nor made a door.

There were counts for work and labour and materials, for money paid, and for money due upon an account stated.

At the trial before *Gaselee J.*, *Middlesex* sittings after *Michaelmas* term, it appeared that the Defendant had,

Defendant agreed to pay Plaintiff, in consideration of her becoming his tenant, 20*l.* to repair the house, and also to make certain alterations.

Plaintiff became tenant under a lease, in which this agreement was not stated, and did the repairs; when Defendant promised to pay for them:

Held, that he was liable, at all events on the account stated, although the agreement had not been introduced into the lease.

by

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SEAGO.

v.

DRANE.

by parol, given a promise to the effect stated in the Declaration; that in consideration of such promise the Plaintiff had become tenant of the Defendant's house under a lease, which did not contain any covenant from the Defendant to the effect of the above promise; that the Plaintiff had done the repairs, and that the Defendant, upon being applied to before the action was brought, said, "I cannot pay you now, but will out of the next rent." A verdict having been given for the Plaintiff for 20*l.*,

Wilde Serjt. now moved to enter a nonsuit instead, or to arrest judgment, on the ground, that this being an agreement concerning an interest in land, could only be evidenced by writing; and, secondly, that the oral contract having been executed by the granting of a lease in writing, nothing could be claimed that was not stipulated for in that lease; *Kain v. Old (a)*, *Pickering v. Domson (b)*; nor could any consideration be shown for the Plaintiff's becoming tenant that was not there specified. As to the count upon the account stated, the Plaintiff must first shew the contract and then the admission applicable to it: but if the contract on which the admission was made, were void, so was the admission;

Bent C. J. This is one of the most iniquitous objections ever made. The contract has been clearly proved, and the objection is purely technical. It must however avail, if it be well founded. If this agreement were part of the consideration for the Plaintiff's engagement under a lease, and it did not appear as part of the terms of the lease, the omission could not be supplied by parol evidence. The agreement, too, as concerning an interest in land, ought to have been in writing. Had

(a) 2 B. & C. 627.

(b) 4 Taunt. 779.

the Plaintiff, therefore, been compelled to rely on the special count she could not have recovered.

But the Plaintiff *did* the thing in question, and after she had done it the Defendant, on being applied to, said, "I cannot pay you now, but will out of the next rent." That declaration was admissible in evidence upon the account stated, and was not affected by the provisions of the statute of frauds. There was a moral obligation to pay and a distinct promise; and there are many cases which shew that a moral obligation, accompanied with a distinct promise, is binding in law.

PARK J. This defence is so wicked and so manifestly unjust, that even if the law were with the Defendant, the Court would not interpose, unless the point were reserved. But on the account stated the Plaintiff is clearly entitled to recover.

BURROUGH J. It appears to me that this was a bargain altogether independent of the lease, and the conduct of the parties shews it to have been so.

GASKELL J. If this had been an action against the landlord for not granting a lease, or against the tenant for not taking it, the objection on the statute of frauds must have prevailed; but here the bargain was executed, and the Plaintiff was entitled to recover upon the account stated.

This, however, was a contract independent of the lease; and it is clear, that though a party be not bound by a contract, yet if he makes a promise after it has been performed, he is liable upon an account stated.

Rule refused.

1827.

SEAGO
v.
DEANE.

1828.

Jan. 31.

EARLE V. HOLDERNESS.

In trover for a packet of letters, the Defendant was allowed to stay proceedings as to one of them, upon delivering it up and paying costs.

TROVER for certain letters or packets. Upon the death of *Nanny Hewlings*, the Defendant received a notice from her brother, on behalf of himself and her next of kin, not to part with any letters or packets addressed to her, or to any person connected with her affairs; and a similar notice from one *Owen Kernan*, who claimed to be her executor.

The Defendant being in possession of some letters or packets of *Nanny Hewlings*, — which he had received from *Demerara*, among which was one addressed to “*Mr. Earle, Clapham, Surrey*,” and all of which he believed to relate to the affairs of the deceased, — under the advice of counsel, refused to deliver them to the Plaintiff, but offered to open in his presence, and in the presence of the brother of the deceased, and of *Owen Kernan*, the letter addressed to the Plaintiff, the Defendant having no interest in any of the documents, and wishing only to secure himself.

This was not agreed to, and the Plaintiff commenced the present action; whereupon,

The Defendant, upon affidavit of the above facts, obtained a rule, calling on the Plaintiff to shew cause why, upon delivering up to the Plaintiff the letter addressed to *Mr. Earle, Clapham, Surrey*, and upon payment of the costs of the action up to that time, all further proceedings in the cause should not be stayed. *Pickering v. Truste* (a) and *Brunsdon v. Austin* (b) were referred to.

(a) 7 T. R. 53.

(b) *Tidd's Pr.* 571.

Taddy Serjt., who shewed cause, contended, that the Defendant, not being executor of *Mrs. Hewlings*, nor setting up any right to the letter, had no claim to the indulgence of the Court; that he ought to offer all the letters or none; and that he could not be permitted to stay the Plaintiff's proceedings upon giving up only a portion of what the Plaintiff sought to recover. It was impossible to say what damages the Plaintiff might sustain by the detention of any of the papers. In *Pickering v. Truste* the value of the goods was admitted, and in *Brunsdon v. Austin* there was no dispute on that point.

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Wilde Serjt. was heard in support of the rule.

BEST C. J. *Brunsdon v. Austin* is expressly in point. There, a defendant in trover was, upon terms, permitted to surrender a part of a steam-engine, which he admitted the plaintiff to be entitled to. Here the action is brought for a bundle of letters; and the Defendant says, "I will defend for all but one." On that authority, therefore, we should be disposed to grant the rule. But the moment the Court went the length of saying, That if a party brought into court the goods in dispute, proceedings should be stayed, they decided, in principle, the present question also; because, if they could do it as to the whole, they could do it upon terms as to part.

The Defendant must pay the costs, because he has asked to stay the proceedings generally, which is too much; but on handing over to the Plaintiff the letter in question, with the costs of the motion, and undertaking to pay the costs of the action, if the Plaintiff recovers on the other letters, or more than nominal damages on this, the Defendant is entitled to have his rule made absolute.

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1828.

EARLE

v.

HOLDENERS.

The rest of the Court concurred, and the rule was made absolute upon the following terms:—

The Defendant to deliver the letter in question to the Plaintiff upon payment of the costs of the application; and if the Plaintiff would accept that letter with the costs of the action in discharge of the action, proceedings to be stayed; if not, the Plaintiff to proceed; and in case he should not recover damages for the other letters, or nominal damages only for the letter in question, to pay the costs of the action.

Feb. 4.

ARCHER v. HALE.

The Plaintiff and Defendant in a replevin suit referred the cause to an arbitrator, and agreed, without the privity of the sureties, that the replevin bond should stand as a security for the performance of the award: Held, that the sureties were discharged.

PARK J. This was an action of replevin, and the case came before the Court last term upon a rule to shew cause why the verdict obtained by the Plaintiff at the preceding Spring assizes for the county of *Herts* should not be set aside; and why the Defendant should not be at liberty to enter a verdict for 556*l.* found to be due to him for rent, by the award of *James Dowling, Esquire*, the arbitrator in the said rule named.

This rule was drawn up upon reading the record of *nisi prius*, and a rule made in this cause on the *Wednesday* preceding, and the affidavit of the attorney for the Defendant, the avowant. In order to understand the case it must be observed, that an application had been made to this Court to set aside a verdict which the Plaintiff in replevin had obtained, upon payment of costs by the Defendant, both of the trial and of the then application; and that the Defendant should be at liberty to add other avowries; but if the Plaintiff would consent to refer to any arbitrator to say what was due for rent,

then

then the rule was to be discharged upon payment of the costs of the action by the Defendant to the Plaintiff; the costs of the reference to be in the discretion of the arbitrator: and it was further stated, that *the replevin bond should stand as a security for such sum as should by him be found to be due.*

These last words will be found to be most material; as upon them much of this decision will depend.

After the above rule was made the parties did agree; and an order was accordingly made by such agreement, by my learned Brother Gaselee, to refer the matter to James Dowling, Esquire, barrister at law.

Upon this reference it appears the learned gentleman mentioned in the order of Mr. Justice Gaselee proceeded, and found the sum of 556*l.* sterling to be due from the tenant, the Plaintiff, which Plaintiff is now insolvent, as it is sworn, and as is probably the case; and the Defendant has paid to the Plaintiff the costs taxed by the prothonotary, as one of the above-mentioned rules requires.

It is positively sworn, not only by the attorney for the Plaintiff, but by both the sureties in the replevin bond, that they never were parties to these proceedings; that they were taken and entered into without their privity or concurrence; that if the sureties had been applied to, they would not have consented thereto, and that by such proceedings having been taken without their consent, they considered themselves discharged from all future liability.

The question is, Whether under the circumstances they are discharged? for there seems no reason to say, if they should be so considered by the Court, the principal may not remain liable upon this award.

Let us first see what the condition of a replevin bond is. It is, that the Plaintiff, the tenant, shall appear at the next county court and prosecute his suit with effect
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ANCHER

v.

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and without delay against the estate, for the value of the cattle, goods, and chattels, and make return of the said cattle, goods, and chattels, if a return thereof shall be adjudged. This is all the surety undertakes to do or to see done.

This is the only security which by virtue of the statute 11 G. 2. c. 19. s. 23. the person granting replevin is authorized to demand, and the only security into which these statutes have entered.

But here the replevin bond, it is said, is to stand as security; and that the sureties, the principal being insolvent, are bound to pay the whole of this sum, viz. 300*l*.

The surety says, *non hæc in fidem venit*, this is by no means the engagement I entered into; I only undertook that the tenant should prosecute his suit with delay, and without delay; and that return should be made of the goods seized, if that return should be adjudged.

Upon this motion it was urged, that the condition of the sureties was not altered by acceding to an attachment; and the authority of Lord Chief Justice Gibbs and the Court of Common Pleas was pressed upon us as having decided the point: first, in the case of *Andrew v. Downwater* (a), where on a motion the Court held, Lord Chief Justice Gibbs then presiding, that the sureties in a replevin were not discharged by the being given to the Plaintiff in replevin, by a reference.

This case was so decided in 1813, before any of the present Judges sat in this Court.

The same case afterwards came on again before the Court upon a demurrer to the pleas of the Defendant, my Brother Burrough and I being then Judges of the Court; but the case having been so recently decided by

(a) 2 Marsh. 81. and 5 Taunt. 379.
 (b) 2 Marsh. 392. and 7 Taunt. 97.

few most eminent persons; and no case having been quoted to the contrary, the judgment went the same way, upon the principle that the sureties, in order to show that they ought to be relieved, must convince the Court that their situation is in fact altered.

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Even upon the present motion, these cases were quoted, and our attention was drawn to no other by counsel on either side, and accordingly we gave judgment against the sureties. But when I went home, upon reference to other cases with which my own private memorandums furnished me, I found that the very case of *Moore v. Bonmaker* had been overruled in another place; the decision of the Court of Common Pleas had been found to be wrong; I therefore stayed the judgment.

Upon the above decision in this Court, it appears that a bill was filed, and that an application was made for an injunction on the equity side of the Court of Exchequer (a), to restrain the proceedings in this Court on the replevin bond; and after argument by counsel on both sides, that Court unanimously decided that the condition of the bond, being an undertaking on the part of the surety that the principal should prosecute his writ with effect and without delay, and make return of the goods seized, if so adjudged; and the landlord and tenant unknown to the surety, and without his concurrence, having entered into an agreement referring matters to arbitration [whereby the tenant was precluded from proceeding according to the condition, and under the agreement, to stay all proceedings pending the arbitration was restrained by the act of the landlord from doing that which his surety had engaged he should do]; when the agreement of reference was executed, the bond,

(a) 3 Price, 124.

1898.

 ARCHER
 V.
 HALL

as against the surety, was *functus officio*, and the Court therefore granted the injunction.

Recollecting, as those who sit here do, what a very eminent person presided in the Court of Exchequer at the time of the above decision, the depth and solidity of his learning upon all subjects, particularly upon those connected with a correct administration of this high office, the accuracy and correctness of his understanding, the anxiety with which he investigated every subject that came before him, and the extreme caution with which he arrived at his conclusions, they must agree with me that any decision of Lord Chief Baron *Thompson* is entitled to the highest respect and consideration from every Judge who either now sits or hereafter shall sit in *Westminster Hall*.

This case, however, came on again upon the merits before Lord Chief Baron *Richardson*; was then fully argued by counsel, and it appears that he had then the two decisions of the Court of Common Pleas fully before him; and after time taken to consider his Lordship, after a most elaborate argument, granted a perpetual injunction against the proceedings in this Court; and the Lord Chief Baron thought that whether the surety was in fact placed in a different situation by what had taken place on the arrangement between the landlord and tenant was less the question than whether by such change of situation he might have been prejudiced: not, whether he did in fact actually sustain any injury in consequence:

And Lord Chancellor *Ellenborough* in pronouncing the judgment of the House of Lords, in the case of an appeal from *Ireland, The Governor and Company of the Bank of Ireland v. Beresford (a)*, seems to lay down the follow-

(a) 6 Dougl. 233.

1828.
 ARCHER
 &
 HALL

the position, as applicable to all cases of principal and surety with reference to the subject of bail only:

His Lordship says, "With respect to principal and surety in a bond, where the creditor enters into an agreement or binding contract with the principal debtor to give him further time, without the concurrence of the surety, the surety is discharged, as the creditor by his new contract destroys the benefit which the surety had under the former contract; as he thus puts it out of his own power to make good his engagement to enforce immediate payment from the principal, which the surety would have had a right to require him to do."

So here the surety would have had a right to require him, the tenant, to prosecute his suit speedily and without delay; but the landlord, by his agreement with the tenant and staying his proceedings, has restrained the surety from compelling him so to proceed.

I have said that the cases from the Exchequer were never mentioned to us in the last term. I presume the learned counsel were not on either side apprized that such decisions had taken place on the very point, otherwise, doubtless, our attention would have been called to them. But having now duly considered them and the reasons therein contained, we think them more agreeable to the condition of a replevin bond than the decisions of this Court; more consonant to the provisions of the statute of 11 G. 2. c. 19. s. 23. and to the general rules respecting principals and sureties, perhaps originally considered in courts of equity, but now adopted and acted upon in courts of law. We, therefore, think that this rule, as far as it affects the sureties, should be discharged, and though not of much use, it may be absolute against the tenant, who is stated to be insolvent.

As against the sureties,

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Rule discharged.

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Assumpsit :
Held, that a plea that the Defendant's undertaking was for the default of another, without writing, and without consideration, might be pleaded, although the facts might have been given in evidence under the general issue.

So, a plea that the person for whom the Defendant's undertaking was given, was a *feme covert*.

Magg, Assignee of T. Howell and J. Howell, Bankrupts, v. Ames.

ASSUMPSIT. The first count of the declaration stated that *Ann Prickett* was indebted to the *Howells* before they became bankrupt, and was arrested at their suit; that thereupon, in consideration that the *Howells* (before their bankruptcy) would procure the discharge of *Ann Prickett*, and take her bill of exchange for the amount of the debt, the Defendant undertook to pay the amount of the bill of exchange in case it should be dishonoured by *Ann Prickett*. Averment of dishonour by *Ann*, and nonpayment by Defendant.

The second count was upon an undertaking to pay the debt for which *Ann Prickett* was arrested, in consideration of *Howells* procuring her discharge.

The Defendant pleaded, first, the general issue: the fourth plea was, that the supposed promises and undertakings in the first and second counts respectively mentioned were special promises, and each of them was a special promise for the debt of another person, to wit, the said *Ann Prickett*; and that no agreement in respect of or relating to the said supposed causes of action, in the said first and second counts of the said declaration, or either of them, nor any memorandum or note thereof, wherein the consideration or considerations for the said special promises or either of them was or were stated or shewn, was or is in writing, or was or is signed by the said Defendant, or by any other person by him thereto lawfully authorized.

The last plea was, that long before and at the time when the said *Ann Prickett* was supposed in and by the

first and second counts of the said declaration to have become indebted to the said *Thomas Howell* and *John Howell*, and from thence continually until the making of the said supposed promises and undertakings in those counts respectively stated, the said *Ann Prickett* was the wife of one *William Prickett*, which said *William Prickett* at the time of the accrual of the said supposed debt to the said *Thomas Howell* and *John Howell*, and during all the time aforesaid, was the husband of the said *Ann Prickett* and in full life.

To these pleas there was a demurrer, on the ground that they amounted severally to the general issue, and tended to great and unnecessary prolixity of pleading; and also that the Defendant had not by those pleas or either of them traversed or denied, or attempted to put in issue, any matter of fact alleged by the Plaintiff in his first and second counts, but had in each of the pleas respectively introduced and attempted to put in issue matters of fact not alleged nor necessary to be alleged. *Joinder.*

Wille Serjt in support of the demurrer. The fourth plea is ill. It contains three allegations on several defences, viz. the want of a promise in writing, the want of the defendant's signature, and the want of consideration for the promise; to which the Plaintiff could not make a complete answer without replying double: for if he should take issue and succeed on one of the allegations, the Defendant might still have a good defence on either of the others. But the matters pleaded might be given in evidence on the general issue; for if true there was no promise on which the Plaintiff could sue.

The last plea is also ill. By reference to the declaration it shows the undertaking on which the Plaintiff sues, and even admitting it to be only doubtful whether or not the Plaintiff had a right to detain *Ann Prickett* in

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custody, yet the giving up a power to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum: *Long v. Edge*. *Dorville*: (a) So, even admitting the bill in respect of which the Defendant's guarantee was given to have been a bad one, the Defendant would, nevertheless, be liable on his guarantee: *Bailey v. Croft*. (b) The matter alleged might also have been given in evidence under the general issue.

Taddy Serjt. contra. The fourth plea is no other than a plea of the statute of frauds, according to the construction put on it in *Saunders v. Wakefield* (c) and *Jenkins v. Reynolds*. (d) It is therefore sufficiently single but if multifarious, that is not one of the objections stated on the demurrer. As to the plea's amounting to the general issue, if it presents matter of law, it may properly be pleaded: *Hussey v. Jacob*. (e) The same rule applies to the last plea.

PARK J. It may be truly said, that, looking through all the law books, there is not a greater variety of opinions upon any question than what pleas do or do not amount to the general issue, nor any one upon which there is a greater mass of contradictory decisions. I shall not therefore attempt, though I have looked at many of them, to go through or endeavour to reconcile them; I satisfy myself in general with saying, that though perhaps the general issue might answer the purpose, it does not therefore necessarily follow that the demurrer on this ground must be allowed, nor that the

(a) 5 B. & A. 117.

(b) 4 Taunt. 611.

(c) 4 B. & A. 596.

(d) 3 Brod. & Ringb. 127 n.

(e) Bac. Abr. Pleas, C. 3. p. 372. 1 Ld. Raym. 87.

Defendant

Defendant was bound to give this matter in evidence under the general issue: *not in writing*.

There are many instances in which a defendant has the option of giving his defence in evidence, or of putting it on the record: *not in writing*.

Although the facts alleged under the Defendant's special plea might have been given in evidence under the general issue, the question is, whether the same facts stated on the record do or do not constitute a good plea.

One species of cases in which this may be done is, where the plaintiff's right of action (which is confessed) is avoided by matter *ex post facto*, as by payment; which may be given in evidence under the general issue, or pleaded. The other case may be, where the plea does not deny the declaration, but answers it by matter of law: *not in writing*.

The plea in this case consists not in denying the Plaintiff's right of action; it is not a denial of the facts in the declaration, but it is matter of defence in law arising out of the statute of frauds. I think the whole of this doctrine, as to what pleas shall amount to the general issue, has been fully and admirably explained by the Judges Bayley, Holroyd, and Littledale, in the case of *Carr v. Hitchkiffe*, 4 B. & C. 547., and which was not quoted to us in this case at the bar on either side.

In the present case it is true, that as it appears to us to be an action brought for the debt, default, or miscarriage of another, the proof must *at the trial* have been, that such promise was in writing, but still, on the face of the declaration, the promise was good. But though, on the general issue, the Plaintiff must have proved the writing, the Defendant avoids that by shewing in pleading that it was not in writing.

The same observations apply to the fifth plea, the coverture of *Anne Prickett*.

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The question then is, taking the declaration and plea together, does this amount to an undertaking with the statute of frauds? If *Ann Prickett* had been discharged out of custody upon a private and absolute undertaking, that the Defendant would pay the debt at all events, or accept a bill for the amount, we are of opinion that the discharge of *Ann Prickett* from imprisonment would be a sufficient consideration, for such a promise, and that the Defendant would be liable.

But the undertaking is, merely, that if the Plaintiff would discharge *Ann Prickett*, then she should take her acceptance for the amount, and that the Defendant, (without indorsing or becoming in any way party to the said bill) would pay the same, *in case* the same should be dishonoured by the said *Ann Prickett*. This, though a new promise, was still only collateral, on the part of Defendant, and being by the demurrer to the plea admitted not to be in writing, the Court are of opinion that the Defendant is not liable. Judgment for that Defendant.

The Court thought that the Plaintiff had no authority to interfere with the rule nisi.
 Discharged. COSTELLO v. CORLETT.

A Defendant, who has been holden to bail in an excessive sum, can only recover his costs under

43 G. 3. c. 46. s. 8. in the court in which the action is

brought; where, therefore, the action was brought in the Palace Court, and removed into the Common Pleas, the Common Pleas refused to order his costs to be taxed.

THIS action, which had been commenced in the Palace Court, was removed by the Defendant into the Court of Common Pleas. The Plaintiff having recovered considerably less than the sum for which he had arrested and holden the defendant to bail, a rule nisi was granted to tax the latter his costs under the 43 G. 3. c. 46. s. 8., by which it is provided, that where a De-

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...if it had been made
...in which the
...that the Plaintiff had not reasonable
...for arresting and holding the Defendant
...the Defendant shall be en-
...to be taxed according to the custom
...in which such action shall have been
...brought.

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COSTELLO
COURT.

...who shewed cause, objected, that under
...the rule sought could only be given by the
...in which the action was brought; and that the
...though removed into this Court, was
...the Palace Court.

...in support of the rule, argued, that if
...were put on the act, it might always be
...actions in the inferior court,
...and then removing them to a higher; that the statute
...and ought to receive a liberal con-
...struction; but

The Court thought, that, under the circumstances,
they had no authority to interfere, and the rule was

Discharged.

...in the
...of the Defendant into
...the Plaintiff having re-
...for which he had
...to bail a rule nisi
...under the 43 G. 3.
...that where a De-
...the action is
...brought; where the common place referred to order his costs to be taxed.

A Defendant
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Defendant

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Feb. 11.

Plaintiff having been imposed upon by a swindler, consigned a box at *Birmingham* by the Defendants, as common carriers, to *J. West*, 27. *Great Winchester Street, London*. The Defendants found that no such person resided there; but upon receiving a letter signed *J. West*, requesting that the box might be forwarded to a public house at *St. Alban's*, they delivered it there to a person calling himself *West*, who shewed that he had a knowledge of the contents of

the box: that person having disappeared, and the box having been originally the property of the Plaintiff by fraud, Held, that the Defendants were liable to him in an action of trover. *Gaselee J. dissentiente.*

Held, also, that it was properly left to the jury to say, whether the Defendants had delivered the box according to the due course of their business as carriers.

At

STEPHENSON v. HART and WATERHOUSE.

CASE against the Defendants as carriers. The first count of the declaration alleged, that the Defendants had received from the Plaintiff a box containing money, goods, and chattels, of the value of 50*l.*, to be safely carried by the Defendants from *Birmingham* to *London*, and there, at *London*, "to be safely delivered for the Plaintiff, for certain reasonable reward to the Defendants in that behalf." Yet that the Defendants, not regarding their duty in that behalf, did not deliver the box and its contents for the Plaintiff; but that Defendants so negligently conducted themselves in the premises, that through their negligence and default the box with its contents were lost to the Plaintiff.

The second count stated, that the Defendants had received the box and its contents of the Plaintiff at *Birmingham*, to be safely kept by the Defendants, and upon demand to be redelivered to the Plaintiff. Yet the Defendants, not regarding their duty in that behalf, did not safely keep the box and its contents for the Plaintiff, nor redeliver it upon his demanding it, but so negligently conducted themselves in the premises, that through their negligence and default the box and its contents were lost to the Plaintiff.

The third count was in trover, with an allegation that the Defendants had converted the box and its contents to their own use. Plea, not guilty.

At the trial before Lord Tenterden C. J., at the last Summer assizes at *Warwick*, the facts were as follow:—

On the 27th of *September* 1826, a person calling himself *J. West* applied to the Plaintiff, a comb manufacturer at *Birmingham*, for a parcel of combs, and after taking a certain quantity with him, ordered 30*l.* worth to be forwarded as early as possible, addressed to *J. West, Esq., 27. Great Winchester Street, London.* In payment he gave the Plaintiff a bill of exchange which had two months to run, purporting to be drawn at *Edinburgh* for 50*l.* by *Guerin*, upon *Le Cointé and Co., merchants, Devonshire Square, London*, and accepted by them, payable at *Smith, Payne, and Smith, bankers, London.* There were several indorsements on the bill, and one purporting to be for the *Royal Bank of Scotland.* The plaintiff agreed to discount the bill; and on the 30th *September* packed up the combs, and the change supposed to be due to *West* (6*l.* 10*s.*), in a box; addressed it as directed by *West*; and booked it for *London* at the Defendants' office in *Birmingham.*

The box arrived the next day: the Defendants, upon offering to deliver it at No. 27. *Great Winchester Street*, found, not only that no such person as *West* was known there, but that the house had not been tenanted for a twelvemonth. About a week or ten days afterwards, the Defendants received a letter from *St. Alban's*, signed *J. West*, informing them that a box for him had been addressed by mistake to *Great Winchester Street*, and requesting them to forward it to the *Pea Hen*, a public house at *St. Alban's.* The Defendants forwarded the box accordingly, when a person calling himself *West*, who had been staying two or three days at the *Pea Hen*, and who had told the mistress of the house that he could not pay her bill till a box arrived in which he expected money, said on its arrival, "That is the box I expected; it contains money;" and proceeding to open it,

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it took out money and paid his bill. The money afterwards disappeared.

The bill of exchange given by West to the Plaintiff having been presented for payment when it became due in December, it was found that there was no such firm as *Le Cointe and Co.* in *Devonshire Square*, and that no such persons had ever kept cash with *Smith, Payne, and Smith.* (a) Application for the box on behalf of the Plaintiff was then made at the Defendant's office in *London*. They first asserted that the box had been returned to *Birmingham*, but afterwards produced the letter signed by *West*, and said, that on receiving it they had delivered the box at *St. Alban's* as before stated.

Lord *Tenterden*, who in the course of the trial had observed, that it was for the jury to say from the whole transaction, whether it was not a mere act of swindling, upon summing up said, that the question for the jury to consider was, Whether the Defendants had delivered the box according to the due course of their business and duty as carriers?

The jury having found a verdict for the Plaintiff, damages 87*l.* 17*s.* 6*d.*,

Williams Serjt. in the last term moved for a new trial on the ground that the jury ought to have been directed to consider whether or not the box had been delivered to the person to whom it was consigned. He also objected, that there was no evidence to support the allegation in the first count of the declaration, that the box was to be delivered for the plaintiff, and by the common law it was to be delivered for and to the consignee; that there was no evidence to support the allegation in the second count, that it was to be delivered

(a) The indorsement of the was given of this at the trial, on Bank of Scotland was also found, account of the expenses of proving to be a forgery; but no evidence if by a witness from Scotland.

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delivered

delivered to the Plaintiff; and that he could not support the count in trover, inasmuch as upon the delivery to the carriers the property in the box ceased to be in him, and was vested in the consignee.

A rule nisi having been granted, *Boqueret Serjt.* shewed cause. The Defendants have acted with gross negligence, for the consequences of which they are liable, even though the person who received the box at *St. Alban's* were the same person who ordered the goods, of which, however, no direct evidence has been given. When the Defendants found that no person of the name of *West* had ever been heard of in *Great Winchester Street*, their suspicions ought to have been awakened; they ought to have kept the box, to have made diligent enquiry into the circumstances, and, above all, they ought not to have forwarded it upon the credit of a mere letter from an unknown individual, who had no fixed residence, but described himself as staying at an inn, from which when he departed, it might be impossible to trace him again. Their duty was to deliver the box to the person to whom it was addressed, at the place to which it was addressed, unless that person satisfied them that he was known at and had visited the place; but here, on receiving a distinct warning that *West* had never been heard of in *Great Winchester Street*, it was inexcusable negligence to part with the box, till that circumstance had been fully explained. *Duff v. Budd* (a) is very similar in its circumstances, and exactly in point; indeed it is a stronger case in favour of the Plaintiff; for there the consignee, not being found at the place to which the box was consigned, but a person of the same name who had not ordered the goods, the carriers delivered the box at
 their

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their own office to a person with whom they had had dealings, under the name specified on the address, but whose residence they did not know. It was held that they had acted negligently, and were liable to the consignors.

That case, which decided that the consignment having been obtained by fraud, the property did not pass out of the consignors, is also an answer to the objections made to the declaration in this case. The transaction in the present case is palpably a fraud, and the person calling himself *West*, a swindler. The property, therefore, in the goods he ordered, never passed out of the Plaintiff. If so, the goods were, in point of law, delivered to the Defendants to be redelivered to the Plaintiff when he should demand them. At all events, if the property never passed out of him, he was entitled to sue in trover.

Wilde and Adams Serjts. contrd. It is clear, from all the circumstances of the case, that the person who received the box at *St. Alban's* was the person who had ordered the goods of the Plaintiff, and to whom the box was consigned; no one else at *St. Alban's* could have stated before hand what were its contents. If he were that person, the Defendants, so far from having been guilty of negligence, have strictly performed their duty. The duty of a carrier is to deliver parcels to the parties to whom they are consigned, and the place at which the parties may receive them is a matter of indifference. Supposing *West* to have been a swindler, of which there is no adequate proof, and which was not distinctly left to the jury, the Plaintiff, because he has been duped, ought not to charge the Defendants, who in the discharge of their duty have delivered the box to the person for whom the Plaintiff intended it. At all events, he ought not to recover from them for negligence unless
 he

he has conducted himself with caution; but there was great want of caution in consigning goods of such value to a person of whom he knew nothing. The loss has been occasioned by the Plaintiff's own negligence, for, without enquiry, he requires the Defendants to deliver the box to *West*, and the Defendants could not refuse to do so. Had *West* come to the Defendant's office in *London* before the box had been sent to *Great Winchester Street*, or had he stood at the door of the house in that street, and had shewn by his knowledge of the contents of the box that he was the person to whom it was addressed, could the Defendants, without subjecting themselves to an action of trover, have refused to deliver it? especially as long as it was unknown whether or not the bill he had given would be dishonoured. Even though the Plaintiff may have been deprived of his goods by fraud, he cannot contend that the property in them remains with him, since he was by his own neglect the occasion of the success of the fraud; he cannot complain if his goods have been delivered to the party to whom it was his intention they should be delivered. According to *Noble v. Adams* (a), circumstances of suspicion in a contract are not enough to leave the property unchanged in the vendor, and he cannot stop *in transitu* if the goods be delivered to the vendee before they reach the place at which he resides. In *Duff v. Bydd*, the plaintiff consigned his goods to a name of known respectability in the place to which they were addressed, and the defendants delivered them to a person who gave no address at all: it never could be ascertained whether he was the person pointed out by the consignor or not; here the box was delivered to the right man, and a delivery to the right man could not be wrongful.

(a) 7 Taun. 19.

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The Court desired to hear *Bouquet* on the applicability of the count in trover, thinking the evidence did not support the two first counts of the declaration. He referred to *Noble v. Adams*, *Rex v. Jackson* (a), *Earl of Bristol v. Wilmore* (b), and *Duff v. Budd*, to shew that where goods are obtained by fraud, the property in them does not pass out of the vendor, who may, therefore, maintain trover; and 2 *Salk.* 655. *Perkins v. Smith* (c), *Yead v. Harbottle* (d), *Devereux v. Barclay* (e), and *Stephens v. Etsell* (f), to shew that delivery by a bailee to a wrong person amounted to a conversion, *Ross v. Johnson* (g) being distinguishable as a case of mere omission on the part of the carrier. In the present case, if the property did not pass out of the Plaintiff, the delivery was clearly to a wrong person. The Plaintiff is not chargeable with negligence, for he had a right to expect that the box would be delivered to a person who should be found in *Great Winchester Street*, and that it would be detained if no such person were found there. As to the argument drawn from a consignor's losing his right of stoppage *in transitu* where goods have been delivered sooner than he expected, that has been held only in cases where the party to whom they have been delivered has acted as warehouseman of the consignee.

PARK J. I rather incline to think that the special counts in this declaration are not borne out by the evidence in the cause; but I consider the action to be maintainable upon the count in trover.

From the cases which have been cited it is clear that trover lies against a carrier for misfeasance in delivering

- (a) 3 *Campb.* 370.
- (b) 1 *B. & C.* 524.
- (c) 1 *Wils.* 328.
- (d) *Peake, N. P. C.* 68.

- (e) 2 *B. & A.* 701.
- (f) 4 *M. & S.* 559.
- (g) 3 *Burr.* 225.

a parcel

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a parcel to a wrong person. In *Ross v. Johnson* a distinction was taken between mistake and misfeasance, and it was held that trover would not lie where a carrier had lost goods by a robbery or theft. Lord Mansfield and Aston J. considering that a case of mere omission. But in *Youl v. Harbottle*, Lord Kenyon, referring to *Ross v. Johnson*, said, that where the carrier was actor, and delivered the goods to a wrong person, he was liable in trover. Abbott C. J., in *Devereux v. Barclay*, took the same distinction between omission and commission, and held the defendant liable for having done an act which he ought not. Bayley J. referred to *Youl v. Harbottle*.

The question, therefore, on the present occasion, is, Whether the Defendant has been guilty of a wrongful delivery for which trover lies? The Plaintiff had sold goods to a felon (for I will not call him a swindler), who tendered a mere fictitious bill in payment. Upon such a transaction the question is, not what the seller means to do, but what are the intentions of the customer. Did he mean to buy in the present case? Never; he went with an intention to commit a felony. *Aickles's case* (a) turned on that distinction. But the point was under the consideration of all the Judges this term, in the case of *James Campbell*, who went to the shop of one *Berens* and proposed to buy fancy articles: *Berens* agreed to sell, and was to deliver them at *Lad Lane* to *Campbell* the same evening. When he came to *Lad Lane*, *Campbell* said he expected a friend with money who had not arrived, and, opening a twopenny post letter which he pretended to have just received, added, "My friend will give me 200*l.* at *Tom's Coffee House*: leave your box, and meet me at *Tom's* in an hour." As soon as *Berens* was out of sight, *Campbell*

(a) *Leach*, 394. 2 *East*, P. C. c. 16. s. 106. p. 675.

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went off with the box, and was heard of no more till his apprehension some days afterwards. The learned Common Serjeant left it to the jury to say, not what was the intention of *Berens*, but whether *Campbell* intended to buy the goods or to steal them. The jury having found him guilty of felony, the point was reserved for the Judges, who held that the property in the goods never passed out of *Berens*.

It is clear that in the present case the person calling himself *West* never meant to pay for the goods, and the question of fraud was sufficiently left to the jury by the Chief Justice's saying in the course of the trial that the whole appeared to be a swindling transaction. Then, on summing up, he left it to the jury to say whether the Defendants had delivered the box according to the course of their business and duty.

It is manifest that they had not. The property in the box was never out of the Plaintiff; and it is plain the Defendants thought so; for upon their failing to find any person in *Great Winchester Street* to whom it belonged, and upon enquiry being made what they had done with it, they affirmed that they had sent it back; and when the falsehood of this was discovered, asserted that they had, at all events, delivered it to the right person. A felon could not be the right person. But were carriers, of their own authority, without consulting the consignor, to send to an inn at *St. Alban's* a box addressed to *Great Winchester Street, London*? If they had made enquiry at *Birmingham*, whence the box arrived, there could have been no difficulty in discovering who was the consignor. But without enquiry, and notwithstanding the warning that was given by the circumstance that *West* had never been heard of at the place to which the box was addressed, they forward it to an unknown person at an inn, upon the faith of a letter of which they did not know the writer. I cannot distinguish this case from

Duff

Duff v. Budd. There the plaintiffs having received an order from a stranger to furnish goods for *J. Parker*, of *High Street, Oxford*, and finding upon enquiry that *Mr. Parker* of the *High Street* was a tradesman of respectability, forwarded the goods by a carrier, having directed them to *J. Parker, High Street, Oxford*. On the arrival of the parcel at *Oxford*, the carrier's porter there, who knew *W. Parker* of the *High Street* (and who was accustomed to deliver parcels at the houses of the consignees), told him of the arrival of the parcel, no other *Parker* residing in that street. *W. P.* said he expected no parcel. A person to whom the porter had before delivered parcels under the name of *Parker*, called at the defendant's office shortly afterwards, and saying the parcel was his, was allowed to take it on paying the carriage, there being many persons of that name in *Oxford*. The plaintiffs having thus lost their goods, desired the defendant, by letter, to apprehend the person who had taken them, if he again presented himself; and afterwards said that they had done with the defendant if the man who had the parcel were produced. A notice was suspended in a conspicuous part of the defendant's office, limiting his responsibility to 5*l.*, except where articles were entered according to their value; and the parcel in question had not been so entered, though worth 8*9l.*

The plaintiffs having sued the carrier, and the Judge having directed the jury that the carrier's negligence had been such as to render it unnecessary to consider the question as to the notice touching the limited responsibility, and a verdict having been found for the plaintiffs, the Court refused to grant a new trial, which was moved for, on the ground that the question touching the notice ought to have been considered; that the Judge ought to have pointed the attention of the jury to the plaintiffs' letter, directing the carrier to apprehend the cheat; and the subsequent conversations thereon; and

that

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that the property of the goods had passed out of the plaintiffs.

That was a much harder case against the carrier than the present, because the person who came to the office had often been there before; but it was never doubted that the property in the parcel remained in the consignor, and I rely particularly on the language of *Richardson J.*, who says, "There was clearly a property in the plaintiffs entitling them to sue, as they had been imposed upon by a gross fraud."

The argument which has been raised for the Defendants, by the assertion that the box has been delivered to the right person, is answered by saying, that a felon cannot be the right person; and as to the Defendants' liability to an action at the suit of *West*, till it was ascertained that the bill he had given would not be honoured, such an action might have been well defended by shewing that the box was tendered at *Great Winchester Street*, and that no such person was known there. I am, therefore, clearly of opinion that the rule which has been obtained on the part of the Defendants must be discharged.

BURROUGH J. I am of opinion that the verdict is right, that there is no ground for a new trial, and that the action is maintainable on the second count of this declaration. At the outset no doubt the contract was between the carrier and the consignee; but when it was discovered that no such person as the consignee was to be found in *Great Winchester Street*, that contract was at an end, and the goods remaining in the hands of the carriers as the goods of the consignor, a new implied contract arose between the carrier and the consignor, to take care of the goods for the use of the consignor. It is clear that the property in them never passed out of the Plaintiff, the consignor.

The

The whole transaction was a gross fraud, — the goods procured by a bill with a false drawer and false acceptor, and no such person as the consignee ever heard of at the place to which he had addressed the goods. That circumstance ought to have awakened the suspicions of the Defendants, and they were guilty of gross negligence in parting with them without further enquiry. In the result, they have the goods of the Plaintiff in their possession, and they are liable to him if they deliver them wrongfully.

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GASELEE J. I am of opinion that the Defendants conducted themselves with gross negligence. When they found that the consignee was not to be heard of in *Great Winchester Street*, it was their duty to have made enquiry whether the statement in the letter from *St. Alban's* was true; and if they had investigated the conduct of *West*, the fraud would have been discovered: but I doubt whether the action can be maintained upon a declaration framed like the present. On the second count it appears as if a contract had been made between the consignor and the carrier. Now, from *Dawes v. Peck (a)*, it is clear that where goods are despatched by a carrier, the contract for payment of the carriage is between him and the consignee, even though the goods should have been booked by the consignor; and though the property in these goods turned out afterwards to be in the consignor, yet that did not appear at the time of the contract. Then can the action be maintained in trover? There can be no doubt that this was a swindling transaction, and I incline to think that the question of fraud was sufficiently left to the jury by what fell from the learned Chief Justice in the course of the trial. But taking that to be so, my doubt is, whether, the goods

(a) 8 T. R. 330.

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having been delivered to the person, who, up to the time the bill drawn by *Le Cointe* became payable, was the person apparently entitled to them, the Defendants are liable in trover for such delivery, as having been guilty of a wrongful conversion of the goods. For delivery to a wrong person, a carrier is no doubt responsible in trover, but from all that appears in this case, it may be collected that the person who received the box at *St. Alban's* was the person calling himself *West*, and the person to whom it was intended the box should be delivered. However, Lord *Tenterden* having left it properly to the jury to say whether the box was delivered in the due course of the Defendants' business, a new trial could not be granted except upon payment of costs; the Plaintiff, too, would amend, and probably recover upon the second trial, so that justice appears upon the whole to have been done; and my two learned Brothers entertaining a different opinion on the subject of the declaration, the rule must be

Discharged.

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(IN THE EXCHEQUER CHAMBER.)

GOLDSTEIN v. Foss and Another.

Jan. 29.

ERROR. The Plaintiff declared, that whereas he was a merchant of good character, and whereas, before the committing of the grievances complained of, divers persons had been associated together, under the name and description of "The Society of Guardians for the Protection of Trade against Swindlers and Sharpers;" and the Defendant *Foss*, under colour and pretence of being the secretary of the said society, had from time to time published, and was accustomed to publish, certain printed reports, for the purpose of announcing and signifying to the members of the said society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed to be ballotted for as members of the said society,

Yet the Defendants, knowing the premises, but greatly envying the happy state of the Plaintiff, falsely time published printed reports for the purpose of announcing to the society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed as members of the society; and whereas the Plaintiff was a merchant of good character, yet the Defendant falsely and maliciously published of and concerning the Plaintiff in his trade and business the following libel:—

"Society of Guardians for the Protection of Trade against Swindlers and Sharpers. *I, E. F.*, am directed to inform you, that the persons using the firm of *Goldstein* (meaning the Plaintiff) are reported to the society as improper to be proposed to be ballotted for as members thereof;" thereby meaning that the Plaintiff was a swindler and a sharper, and an improper person to be a member of the said society:

Held, that the innuendo could not be supported without a previous averment, that it was the custom of the society to designate swindlers and sharpers by the terms, *improper persons to be members of that society*, and that it did not appear that the society described in the libel was the society described in the introductory part of the declaration.

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and maliciously did compose, print, and publish the following false, scandalous, malicious, and defamatory libel of and concerning the Plaintiff in the way of his trade and business. — “ Society of Guardians for the Protection of trade against Swindlers and Sharpers. — I, *Edward Foss*, am directed to inform you, that the persons under-named, or using the firm of *Goldstein*,” (meaning the Plaintiff) “ *Castle*, and Co. 51. *Mark Lane*, and *Benjamin Porter*, baker, *Hackney Road*, are reported to the society as improper to be proposed to be ballotted for as members thereof;” thereby then and there meaning that the said Plaintiff was a swindler and a sharper, and an improper person to be a member of the said society.

There were other counts, varying the innuendoes, but without the introductory matter as to the Guardian Society. Plea, not guilty.

At the *Middlesex* sittings after *Hilary* term 1826, a verdict was found for the Plaintiff, damages 150*l.*; but judgment having been arrested in the Court of King's Bench, on the ground that the innuendo was not warranted by the libel, and that the society mentioned in the libel was not averred to be the same society as that mentioned in the introductory matter (*a*), the present writ of error was brought.

P. Pollock, for the Plaintiff, contended, that the name of the society, mentioned in the introductory part of the declaration, being the same as that mentioned in the libel, and it nowhere appearing that there were two societies of that name, the society mentioned in the libel was sufficiently connected with that mentioned in the introductory part of the declaration; if so, the innuendo attached to the libel was sufficiently warranted by the preliminary allegation, that it was the practice of the

(a) 6 B. & C. 154. 100 N. 1. 1. 1.

Defend-

Defendant, as secretary of the society, to publish reports, specifying the names of persons who were swindlers, and improper persons to become members of the society. But, inasmuch as a libel might be conveyed in any terms, however innocent in themselves, provided the parties employing them were agreed to take them in the libellous sense, if a jury found that the sense intended were correctly conveyed by the innuendo, any defect of introductory allegation would be cured by verdict; *Coles v. Haveland*. (a) 1 Wms. Saund. 227. n. 1.

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Campbell contrd. Without an innuendo the letter complained of is no libel. But without introductory averments an *innuendo* cannot extend the meaning of words, or affix to them a sense which they do not usually bear; much less can it introduce any allegation of fact; 1 Wms. Saund. 243. n. 4. *Holt v. Scholefield* (b), per Lawrence J. in *Hawkes v. Hawkey* (c), *Barham's case*. (d) The allegation in this innuendo, that by saying the plaintiff was an improper person to belong to the Guardian Society, the Defendant meant he was a swindler, is a departure from the ordinary meaning of the words, which could only be warranted by a previous averment, that it was the practice of the Defendant and the Guardian Society to designate swindlers by the term *improper persons*. There being no such averment with which the innuendo can be connected, the finding of the jury does not mend the Plaintiff's case. Such a finding might cover a good title to damages defectively stated, but not a defective title. But the Plaintiff has no title to damages unless he first alleges and proves that it was the custom of the Defendant to designate swindlers by the term *improper persons*.

(a) Cro. Eliz. 250.

(b) 6 T. R. 691.

(c) 8 East, 427.

(d) 4 Rep. 20 a.

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Pollock. If a libel be written in a foreign language the office of the innuendo is to translate and apply the language to the plaintiff; in doing that it neither extends the meaning nor makes any allegation of fact, it simply explains the epithets employed; and if the jury finds the explanation to be correct the plaintiff's title to damages is complete. The innuendo in the present case has done no more, — it has explained the meaning of the epithet employed by the Defendant; and the jury having been satisfied with the explanation, the Plaintiff is entitled to retain his damages. Unless such an innuendo were sufficient it would be impossible to obtain justice against unlawful societies, which should adopt a language peculiar to themselves.

BEST C. J. The Court does not entertain the smallest doubt, and the judgment below must be affirmed. It has been urged, that if that judgment be supported there will be no means of obtaining justice against the society. It would not be difficult, however, so to put a case on the record against the secretary, if he makes a false report, as to try the merits of the proceeding; but on the present record there are not facts enough to shew, that the construction put upon the libellous words by the innuendo is the sense in which they were employed by the Defendant. The words do not naturally import that the Plaintiff is a swindler; and we want an allegation of fact to prove that they were used in that sense. A man might be improper to be a member of that society if he were old or infirm, or had not a sufficient knowledge of the resorts of swindlers. If the declaration had gone on to aver that it was the custom of the society to designate swindlers by the term *improper persons* the innuendo might have been sufficient. But an innuendo cannot add a fact or enlarge the natural meaning of words. And looking at these

these words, without the allegation of that fact, no one would know that the Plaintiff was a swindler, because he was not a proper person for the Guardian Society. The plain ground of our judgment is, that we cannot see, on this record, that the Plaintiff was charged with having been a sharper or swindler; and this is a defect which the verdict does not cure, the question turning on the construction of words which are not adequately shewn to bear any other than their natural meaning. If a verdict were to cure defects of this nature, it would deprive parties of the valuable privilege of an appeal to a court of error, though Mr. Fox's bill expressly reserves the liberty of moving in arrest of judgment.

Judgment affirmed.

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HANSON v. ROBERT and SAMUEL BLAKEY.

Jan. 31.

THE Plaintiff had judgment last *Michaelmas* term against the Defendants in an action for money lent. On the 13th of *November*, the sheriff took the Defendants' goods under a *fi. fa.* on this judgment. And on the same day the Defendants obtained the allowance of their certificate under a commission of bankrupt issued against them on the 21st of *May* 1826.

By a Judge's order the sheriff was directed to restore to the Defendants the goods taken in execution, and the proceedings under the execution were to be suspended upon the Defendants paying into Court 47*l.* 2*s.* with sheriff's poundage, to abide the event of any application to the Court by either party to have the same paid out. Accordingly,

A bankrupt obtained his certificate on the 13th of *November*; the same day a *feri facias* was executed on his goods: the Court refused relief on motion.

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Peake Serjt. having obtained a rule, calling on the Plaintiff to shew cause why this sum should not be paid out of Court to the Defendants, on the ground that, as certificated bankrupts, they were discharged from the execution,

Wilde Serjt., who shewed cause, contended, first, that though the certificate bore date the 19th of *November*, it did not appear that it had been signed before the execution was levied: secondly, that from the 126th and 121st sections of the stat. 6 G. 4. c. 16. it was to be inferred that the legislature meant only to exempt the *person* of a certificated bankrupt from execution, and not his goods. At any rate, if the point were doubtful the Court would not interfere on motion, but put the party to his *auditâ querelâ*.

Peake. The language of the recent act is the same as that of the old ones, and under them it has been held, that the bankrupt is entitled to his *auditâ querelâ* in a case like the present; *Lister v. Mundell*. (a)

BEST C. J. This is an application to which the Court cannot accede. Notwithstanding the authority of *Eyre* C. J., which, indeed, is entitled to the greatest respect, it is exceedingly doubtful whether, in this case, the bankrupt would be entitled to an *auditâ querelâ*; and in such cases relief is only granted on motion where it is quite clear an *auditâ querelâ* would lie. In *Hewes v. Mott* and *Dalby v. Mott* (b), where bail sought, to be exonerated, on the ground that the debt for which their principal was sued might have been proved under a commission of bankruptcy against the debtor, the Court held, that the title of the bail to relief was, by no

(a) 1 B. & P. 427.

(b) 6 Taunt. 330.
means

means sufficiently clear to induce them to decide the case upon an extra-judicial motion, thereby leaving the Plaintiff no appeal by a writ of error. If we were to decide this summarily on motion the Plaintiff would be deprived of any appeal on error to which he would be entitled on *auditá querelá*. It is exceedingly doubtful, whether the bankrupt can have any claim to these goods, the property in which, if not in the Plaintiff, is in the assignees; and it is doubtful whether the discharge, under s. 121. of 6 G. 4. c. 16., extends to the bankrupt's goods. By that section it is enacted, "That every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed." If the legislature had intended that the protection of the certificate should extend beyond the person, they would have so expressed it when the old acts were all under revision. But as all the property of the bankrupt belongs to his assignees, there seems to be no reason why the protection of the certificate should be so extended.

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v.
BLAKEY.

PARK J. The language of s. 121. 6 G. 4. c. 16. is, no doubt, the same as that of the former acts; but, except for the case of *Lister v. Mundell*, I should have felt no difficulty upon the present occasion. It seems to me very doubtful whether the bankrupt would be entitled to relief on *auditá querelá*; and unless he were clearly entitled he cannot be relieved on motion. Section 126. relates exclusively to the discharge of the bankrupt's person; and it is at least questionable, whether

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whether s. 121. carries the matter further. Besides this, it is far from clear, whether the bankrupt has any claim at all to the goods in question; and it would be of no use to restore them, if the assignees might seize them the next moment.

BURROUGH J. It being doubtful whether an *audita querela* would lie, the bankrupt cannot be relieved on motion. But another ground for rejecting this application is, that the execution was issued on the same day as the certificate; and we are not informed which was the first.

GASELEE J. It has never been decided that *audita querela* will lie in a case like the present; the application for relief on motion must, therefore, be rejected.

Rule discharged.

Feb. 1.

HEYWOOD and Others v. T. W. WATSON.

Defendant and *M.*, partners, having obtained leave to overdraw their bankers, the Plaintiffs, *M.* gave them

ASSUMPSIT. The declaration contained counts on the promissory note for 1000*l.*, set out below, together with the usual money counts. At the trial at the *Lent* assizes 1827, for the county of *Lancaster*, before *Hullock B.*, a verdict was found for the Plaintiffs for the sum of 1000*l.* on the counts upon the note, a promissory note for 2000*l.*, as a security for advances, and Defendant thereupon gave *M.* a note for 1000*l.*, payable to order. Plaintiffs advanced 1300*l.* to *M.* and Defendant, and two years after, being in possession of Defendant's note for 1000*l.* by transfer from *M.*, sued Defendant. It did not appear that they had given *M.* any consideration for it, or that they had notice of the circumstances under which Defendant gave it to *M.*:

Held, they were entitled to recover.

subject

subject to the opinion of the Court upon the following case:—

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The Plaintiffs were bankers at *Liverpool*, the Defendant was a merchant there. In the year 1815 the Defendant entered into partnership with *Cyrus Morrall*, the payee of the promissory note, on which this action was brought, under the firm of *Morrall and Watson*. On the 9th of *February* 1824 the said partnership obtained from the Plaintiffs, who were their bankers, permission to overdraw their banking account with the Plaintiffs, and *Morrall* gave to the Plaintiffs as collateral security for the said advances, his separate promissory note for 2000*l.*, which was as follows: “*Liverpool*, 9th *February* 1824. On demand I promise to pay to *Arthur Heywood*, Esq., Sons, and Co. (the Plaintiffs), or order, 2000*l.*, value received. *Charles Morrall*.” On the 10th *February* 1824 the Defendant, for the purpose hereinafter mentioned, drew the promissory note on which this action was brought, which is as follows: “On demand I promise to pay *Cyrus Morrall*, or order, 1000*l.*, value received. *Thomas Wright Watson*.” Endorsed *Cyrus Morrall*. No evidence was given of express notice to, or express knowledge by, the Plaintiffs of the purpose for which this note was drawn, or of the letter dated the 10th day of *February* hereinafter mentioned. On the said 10th *February* 1824, the Defendant sent the last-mentioned promissory note to *Morrall*, enclosed in a letter addressed to *Morrall*, in which the Defendant stated that he deposited with him, *Morrall*, the note in question to meet his, *Morrall*’s, collateral security given in the said note for 2000*l.* to the Plaintiffs for the said advances, and to secure to *Morrall* repayment of his, the Defendant’s, moiety of that sum, or of such sum as *Morrall* individually should have to pay the Plaintiffs on the joint account of himself (*Morrall*) and the Defendant. The partnership of
Morrall

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Morrall and Watson terminated on the 20th February 1825.

The Plaintiffs proved that they were possessed before June 1826 of the Defendant's note indorsed by *Morrall* to them, but it did not appear how much sooner they were so possessed, or when it was so indorsed by *Morrall*. No consideration for such indorsement was proved, nor any application to *Morrall* previous to such indorsement for payment of his said note for 2000*l.*, nor for the payment of the said advances. Neither the said last-mentioned note, nor the said advances, nor any part thereof, have been paid by *Morrall*, but the same note remains unsatisfied in the Plaintiffs' hands. The Plaintiffs have not made any advances on account of the partnership of *Morrall and Watson* since the termination of the partnership, and neither *Morrall* nor the Defendant was, at the time when the note came into the Plaintiffs' possession, indebted to the Plaintiffs nor has either of them since become indebted to the Plaintiffs on his separate account, unless the Court should be of opinion that the Defendant, as maker of the said note, was, under the circumstances of this case, indebted to the Plaintiffs as payees thereof. The Plaintiffs were *Morrall's* bankers. The said advances amounted to 1800*l.*, which was still unpaid. They were made to the partnership of *Morrall and Watson*, or on their account jointly, and not to *Morrall*, or on his account separately, and were so debited in the Plaintiffs' books.

The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover the said sum of 1000*l.*, or any part thereof, on the said counts on the note or not. If the Court should be of opinion that they were so entitled, the verdict was to stand; but if the Court were of opinion that they were not so entitled, a nonsuit was to be entered.

Bussell

~~Russell~~ Serjt. was to have argued the case for the Plaintiffs, but the Court called on

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~~Wilde~~ Serjt. for the Defendant. It may be collected from the circumstances stated in this case that the Plaintiffs received the note without consideration, and that they knew, or had means of knowing, that *Morrall* had given no consideration for it to the Defendant; if so, they are not entitled to sue. It is stated that they had not express notice of the circumstance, from which it must be inferred that they knew it without express notice; and then there was sufficient to put them upon making enquiry. If there were circumstances to excite suspicion, and the Plaintiffs failed thereupon to make the requisite enquiries, they must take the consequences. The note which was payable on demand, and without interest, does not appear to have been in their hands till more than two years after its date; it is impossible to conceive that the holder would lie by all that time if he had given value for the note: that was a circumstance of itself sufficient to throw on the Plaintiffs the duty of enquiry. It is clear that *Morrall* could not have recovered on the note; and if so, neither can the Plaintiffs, having received it so long overdue, unless they gave consideration; but as they proved no consideration, it must be inferred they gave none. It is plain the note was only deposited in their hands as an additional security for the advances they might make to *Morrall* and *Watson*, and the transfer is evidently a trick on the part of *Morrall* to make *Watson* pay 1000*l.* towards those advances instead of 650*l.*

~~Baron~~ C. J. I think there was abundant consideration for the present action. The Plaintiffs are bankers, whose consent the Defendant and *Morrall* had ob-

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tained to overdraw their account, which they did, to the extent of 1300*l.*; but the Plaintiffs required from *Morrall* his note for 2000*l.* as a security; he gave it them, and the Defendant thereupon gave to *Morrall* his note for 1000*l.*, being half of the liability incurred, and this note *Morrall* pays in to his bankers the Plaintiffs. It has been urged that he only deposited, and did not pay it. If that had been so, the effect might have been different; but no such fact appears, and it is immaterial whether *Morrall* could have sued the Defendant or not. If there was a good consideration as between *Morrall* and the Plaintiffs, and the Plaintiffs, as it is alleged, were ignorant of the circumstances under which *Morrall* took the note, they are entitled to recover. If the Plaintiffs knew those circumstances, the Defendant should have shewn that; but in the absence of any such proof, it must be taken that the Plaintiffs received the note in ignorance of those circumstances. Even if they had known them, I am of opinion they might have sued. *Morrall* says to them, "I have received this note as a security for myself, and I transfer it as an additional security to you." As they had a right to sue *Morrall* on the 2000*l.* note, they had equally a right to sue the Defendant for the 1000*l.*; *Morrall* thus giving them the opportunity. The effect no doubt is, that the Defendant is at first called on to pay more than half of the 1300*l.* advanced to him and *Morrall*; but he may call on *Morrall* to pay back his proportion.

PARK J. On the face of these proceedings I see no difficulty. The action is brought on a note payable to order, and indorsed to the Plaintiffs, who have a clear right to sue. It has been urged, that they should have enquired into the circumstances attending the making of the note; but they had no notice of those circumstances,

stances, nor any ground of suspicion to put them on enquiry; for though the note was made in 1824, it was payable on demand, and therefore could not be esteemed overdue till demand had been made. And even if the circumstances had been known, it is by no means clear that they would have furnished a defence to the action.

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BURROUGH J. I see no ground for saying that the Plaintiffs, as legal holders, had not a right to sue on this note.

GASELEE J. It is not necessary to enquire what would have been the result if the Plaintiffs had had notice of all the circumstances, for upon this case they are fully entitled to recover. There is strong reason to believe that the note was given by the Defendant expressly to cover the Plaintiffs' advances, for it is made not to *Morrall* alone, but to order. The Plaintiffs, therefore, might well deem it a note which they were entitled to apply to their advances.

Judgment for the Plaintiffs.

WILCOXON v. NIGHTINGALE.

Feb. 1.

THIS was an action against the sheriff of *Cambridge-shire*. The first count of the declaration was for voluntarily permitting the escape of one *John Ward Kirke* on mesne process issued by the Plaintiff.

In an action against the sheriff for an escape, it is sufficient to allege, that the writ for

the caption of the escaper was duly indorsed for bail for ————, without adding, "by virtue of an affidavit made and filed of record."

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 v.
 NICHOLLS
 CASE

There was a second count for not arresting Kirke, and a third for not assigning the bail-bond.

The declaration alleged that the writ of *capias* for arresting Kirke was "*duly marked or indorsed for bail for 25l. and upwards*;" and, being so indorsed, afterwards, and before the return thereof, was delivered to the Defendant, who then was sheriff of *Cambridgeshire*, to be executed. But in none of the counts was it averred that the writ was indorsed for bail *by virtue of an affidavit of the cause of action for the sum specified before them made and filed of record*.

Demurrer, assigning for cause the omission of such averment, and joinder.

Stark's Serjt. in support of the demurrer. By 12 G. 1. c. 29., 5 G. 2. c. 27., and 21 G. 2. c. 9. it is enacted, that in all cases where the plaintiff's cause of action shall amount to the sum of 10*l.* and upwards, an affidavit shall be made and filed of record of such cause of action, and for the sum or sums specified in the said affidavit, and no more, the sheriff or other officer to whom writ or process shall be directed shall take bail; and if no such affidavit shall be made as aforesaid, the plaintiff or plaintiffs shall not proceed to arrest the body of the defendant.

In all actions against sheriffs for a breach of duty, it is necessary to shew the obligation of the defendant strictly. The omission of an averment (after stating a commitment to prison) that the committal was of record, was held fatal on special demurrer. *Barns v. Eyles* (a), *Bolton v. Eyles*. (b) So the trifling omission of the words "*of the Bench*," in the averment that the sheriff had not the body "*before our said lord the king*" on the

(a) 8 Taunt. 512.

(b) 4 B. Moore, 425.

return day, was also held bad on special demurrer. *Stovin v. Paring* (a), *Turner v. Eyles* (b)

In the present case, an affidavit of the amount of the debt filed of record was necessary to enable the sheriff to arrest the defendant in the first action, otherwise the arrest would have been illegal as upon a void process.

Webb v. Herne (c) is not an authority upon this question; for *Croke v. Dowling*, the case cited by the Judges from *Buller's Nisi Prius*, p. 14., was an action for a malicious prosecution, in which it certainly was not necessary to set out that the plaintiff had made any affidavit. *Whiskard v. Wilder* (d) was an action on a bail-bond, and not against a sheriff. This is an action against an officer, and the Plaintiff is bound to set out on the record, and prove that he has complied in all respects with his duty, before he can complain of the misconduct or breach of duty of the sheriff.

BEST C. J. It is not necessary that the declaration in this action should contain a statement of the filing of the affidavit. No case has gone that length. It has only been laid down that in favour of a public officer the Courts will decide on grounds purely technical. The statute 12 G. 1., indeed, requires that previously to an arrest an affidavit of the cause of action shall be filed; but the sheriff has nothing to do with the affidavit. If the plaintiff or the officer of the Court indorse a writ improperly, they are punishable for their misconduct; but the sheriff is only bound to see that the writ is indorsed. It is impossible that he should know in *Cornwall* whether an affidavit has been duly filed in *London*. In *Casburn v. Reid* (e) it is laid down that if

(a) 2 B. & P. 561.

(b) 3 B. & P. 456.

(c) 1 B. & P. 281.

(d) 1 Burr. 330.

(e) 2 B. Moore, 60.

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the filing of the affidavit be alleged in the declaration, it must be proved; but it was also thought that the allegation might be omitted, and by the omission superfluous evidence is spared.

PARK J. I am of the same opinion. The precedents are both ways; and if the filing of the affidavit be stated, the Courts hold that it must be proved; but it is not necessary to state it. The point was much canvassed in *Casburn v. Reid*, and that was the decision which the Court pronounced. The present declaration states that the writ was duly indorsed, which means indorsed according to law. The objection is most frivolous; and if it could prevail, would be disgraceful to the law.

BURROUGH J. It is sufficient for the sheriff if the sum demanded be duly marked on the writ. A declaration need only be certain to a certain intent in general, and this is so.

GASELEE J. In *Casburn v. Reid* the Court referred to *Webb v. Herne*, where *Buller J.* said, "I remember a case in Lord *Mansfield's* time, where it was held unnecessary to produce the affidavit." If the precedents had uniformly stated the filing of the affidavit, perhaps there might be some weight in the objection; but I find the declaration has been framed in various ways, in general alleging only that the writ was delivered to the sheriff.

Our judgment, therefore, must be for the Plaintiff.

Judgment for the Plaintiff accordingly.


1828.

DOE dem. STEVENS and Another v. SCOTT.

Feb. 5.

THE lessors of the Plaintiff claimed the property in dispute, as trustees of *Sarah Scott*, under the will of *Mary Wilcox*, which was as follows: "I give and devise unto *Charles Stevens* and his heirs, all that my messuage or tenement, dwelling-house and premises situate in *Aylesbury Street, Clerkenwell*, now in lease to and in the possession of *Mr. Scott*; and all that my freehold messuage or tenement, with the appurtenances, situate and being in *Gray's Inn Lane*, in the parish of *St. Andrew, Holborn*, known by the sign of the *Black Dog and Punch Bowl*, in the possession of *Mr. Mouse* or his under-tenants, *in trust to and for the sole and separate use of my daughter Sarah Scott, and to convey, assign, and assure the said last-mentioned freehold messuage, tenement, and premises unto her, the said Sarah Scott, her heirs and assigns for ever, free from and independent of the debts, control, power, or engagements of her present or any future husband, and to empower and permit her to take and receive the rents, issues, and profits of the said last-mentioned premises, and to give receipts and discharges for the same from time to time, or to appoint any person to receive the same as if she was sole and unmarried.*" The Defendant claimed under the will of *Sarah Scott* as follows: "I give and bequeath to my husband, *Charles Scott*, my two freehold houses, one known by the sign of the *Black Dog and Punch Bowl*, a public house in *Gray's Inn Lane*, in the parish of *St. Andrew, Holborn*, now in the possession of *Messrs. Reid and Co., Liquor Pond Street*, and the other now in

Devise to *G. S.* in trust for the separate use of *S. S.*, and to convey the premises to *S. S.*, her heirs and assigns, free from the control of her present or any future husband, and to permit her to take the rents and profits: Held, that *S. S.* had no power of devising the premises.

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 v.
 Scott.
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my husband's possession, namely, No. 8. in *Aylesbury Street, Clerkenwell*, in the parish of *St. John*, which is joined to *St. James's Clerkenwell*, with all shops, out-houses, yards, and appurtenances thereto belonging, as left at my sole disposal by my mother's will, namely, *Mary Wilcox*, late of No. 9. *Clerkenwell Close*, for and during his, my said husband, *Charles Scott's* natural life."

At the trial of the cause, *Middlesex* sittings in *Michaelmas* term last, a verdict was found for the lessors of the Plaintiff, with liberty for the Defendant to move to set it aside, and enter a nonsuit instead.

Jones Serjt. having obtained a rule nisi to that effect,

Taddy Serjt. shewed cause. Under *Mary Wilcox's* will, *Sarah Scott* took only an equitable interest; the legal estate was in the trustees, to enable them to secure the profits to *Sarah Scott's* separate use (*Harton v. Harton* (a), *Jones v. Lord Say and Sele* (b)), and she could not divest them of it by a devise which she had no authority to make.

Jones. The will of *M. Wilcox* must be construed according to her intention: her intention clearly was, to give *Sarah Scott* the whole interest in the premises, and as incidental to such absolute interest, *S. Scott* had the power of devising. As no one else is mentioned in the will besides *S. Scott*, the trustees were only interposed to prevent the interference of marital rights; and, according to the well known rule, the courts will not give them an interest greater than is necessary to effectuate the intentions of the testator. The effect of the will, therefore,

(a) 7 T. R. 652.

(b) 1 Eq. Cas. Abr. 383.

is, to give them the legal estate during the life of *S. Scott*, with a power for her to devise the remainder in fee. In *Harton v. Harton*, and *Jones v. Lord Say and Sele*, the testator had no intention to give the whole interest to a feme covert, for the devise was to trustees in trust for a feme covert during her life, and then in trust for the heirs of her body. But for the circumstance of *Sarah Scott's* being a feme covert, it is clear that the testator would have given her a legal fee simple: a trustee was interposed to protect her against her husband; but that protection is effected by giving the trustee the legal estate during her life; and in *Doe dem. Player v. Nicholls* (a), the intent of a testator being clear, the Court held that the trustees took only an estate determinable on the happening of an event which the testator had indicated. A gift to the separate use of a feme covert is tantamount to a gift to such use as she shall devise; and if the intent of the donor cannot be effected without presuming a power to devise, such a power may be presumed, for no precise form of words is requisite to create it.

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Stevens
vs
Scott.

PARK J. It is admitted that at the time of the devise by *Mrs. Scott*, the legal estate in the premises in question was in her trustees for the purpose of securing her against the rights of her husband; but as the beneficial interest was left to her in fee, we are called on to presume that she had, incidentally to such interest, a power of devising. That would be going further than any court of law has hitherto done. In *Jones v. Lord Say and Sele*, the devise was to trustees and their heirs, in trust to pay several legacies and annuities, and to pay the surplus to a feme covert for life to her separate use, or as she should direct; and after her death, the trustees to stand

(a) 1 B. C. 336.

1848:
~~DOE~~ dem.
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v.
SCOTT.

seised to the use of her body, with remainders over. And it was holden, that the use was executed in the trustees and their heirs during the life of the feme covert, and after her death, in the persons entitled to take. Here, in the same way, *Sarah Scott* had a trustee for her life; and even if she had survived her husband, it may be thought the trustee ought to have held, to secure her against a future husband, though after her death he might be bound to convey to her heir. At all events, it is clear that *Sarah Scott* had no power to devise.

BURROUGH J. The words of the will clearly give the legal estate to the trustees, and there is no possible ground for presuming that *Sarah Scott* had a power to devise.

GASELEE J. I never entertained any doubt on the subject, and only reserved the point to save the expense of a second trial. The legal estate is in the trustees, and on the death of *Sarah Scott*, they are trustees for her heir at law. The rule must be

Discharged.

1828

AKED v. STOCKS, BARSTOW, and Others.

Feb. 8.

THIS was an action of trespass against two magistrates of the West Riding of Yorkshire, and four other persons, who suffered judgment to go by default. The magistrates pleaded the general issue.

The notice of action served on the magistrates pursuant to the statute 24 G. 2. c. 44. was for having caused the Plaintiff "to be unlawfully convicted for not paying to *Thomas Wood*, of *Halifax*, card-maker, the sum of 10*l.* for wages supposed to be due to the said *Thomas Wood*, and the further sum of 15*s.* 6*d.* for costs alleged to have been incurred by *Thomas Wood* in recovering the said wages, and for having issued a warrant in writing under their hands and seals, bearing date on or about the 3d of *March* 1827, directed to *Joseph Bark*, thereby commanding him to distrain the goods and chattels of the Plaintiff for satisfying the said sum of 10*l.* 15*s.* 6*d.*, under which warrant, the premises of the Plaintiff, situate at *Halifax*, were unlawfully entered, and his goods and chattels therein forcibly taken and distrained, and sold and disposed of, to his loss."

At the trial before *Bayley J.*, last *York Summer* assizes, the warrant produced under a notice to the Defendants to produce it, appeared to be addressed not to *Joseph Bark*, but to "the constable of the township of *Halifax*." It further appeared, that one *Brearly*, and not *Bark*, was the constable of that township; that *Bark* was not a constable; and it did not appear that the magistrates had employed *Bark* to levy the distress.

Upon this variance a verdict was found for the magistrates, with leave for the Plaintiff to move to set it aside,

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The Plaintiff having sued a magistrate, gave notice of his cause of action; that the magistrate had unlawfully convicted him of not paying wages, and had issued a warrant for seizing his goods directed to *J. Bark*, under which they were seized accordingly.

The warrant having been directed to the constable of *Halifax*, and not to *J. Bark*:

Held, that the notice was insufficient.

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and enter a verdict for the Plaintiff, if the Court should be of opinion that the notice was not incorrect.

Cross Serjt. accordingly obtained a rule *nisi* to that effect, which the Court, stopping *Wilde Serjt.*, who was to have shewn cause, called upon him to support. He contended, that the notice required by the statute was sufficient, if it disclosed to the magistrate the ground of the Plaintiff's complaint against him, so that he might know what he was charged with, and make amends if he thought fit: that the present notice was sufficiently explicit in that respect, and that the insertion of a wrong name for the constable could not mislead the magistrate, the material charge against him being the illegal conviction and levy, and it being perfectly immaterial by whom the levy was made. It was therefore unnecessary to have inserted the name of the person directed to make the levy; such a statement might in a declaration have been rejected as surplusage, and it could not be required that a mere notice of action should be more precise than a declaration. The Plaintiff had given all the information in his power; he had no means of compelling the officer to furnish a copy of the warrant, or of knowing whether *Bark* or *Brearky* were the true constables of the township. No man could ever obtain justice against a magistrate, if notices of action were to be framed with such rigid precision.

PARK J. I am sorry when any man is tripped up by a formal objection, and the Court would go great lengths to sustain the argument in favour of the Plaintiff; but we are bound to the strict construction of an act of parliament passed expressly for the protection of justices of peace in the execution of their office. Country magistrates, acting with the most honourable intentions, may occasionally be entrapped into error by

want

want of knowledge of the law, and this statute enables them to get out of the difficulty by tendering amends.

The question therefore is, Whether this notice sufficiently discloses the Plaintiff's cause of action within the meaning of the statute. In *Strickland v. Ward (a)*, it was holden, that a mistake in the description of the form of action was fatal to the validity of the notice. It has since been determined, that it is not necessary to state in the notice the precise form of action; but the notice in the present case describes the cause of action to be a warrant directed to *J. Bark*, and the warrant signed by the Defendant, when produced, appears to be directed to the constable of *Halifax*. No doubt it appears hard upon the Plaintiff that this should vitiate his notice; but the act prescribes that no evidence shall be received of matters not specified in the notice, and when I find that the cause of action was a warrant directed to the constable of *Halifax*, I cannot think that evidence ought to have been received of a warrant directed to *J. Bark*, who was not a constable at all. The statute too empowers the Plaintiff to demand a copy of the warrant, and if he falls into error by undertaking to set it out without demanding a copy, he cannot complain of the consequence.

GASELEE J. (b) I should be glad, if, consistently with the decided cases, we could comply with the Plaintiff's application: but looking at the long string of decisions which have put a strict construction on the act, I feel that we are not at liberty to do so. The act requires that the Plaintiff shall give the magistrate notice of the cause of action, and it has been held that the cause must be particularly stated. In *Ward v. Strickland*, the Court held the notice bad, because there was a

(a) 7 T.R. 2. 637. 638. (b) *Burroughs J.* was absent at chambers.

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mis-statement of the cause of action; and though it was afterwards determined that the cause of action need not be specified, yet if the Plaintiff undertakes to specify it, he must do so correctly. In the present case, the substantial cause of action is the conviction of the Plaintiff, and the unlawful issuing of a warrant to *Bark*. Perhaps it might not have been necessary for the Plaintiff to have named the person to whom the warrant was directed; but having undertaken to do so, his notice is not sufficient to support an action for the seizure of his goods under a warrant directed to the constable of *Halifax*. The case is not in substance distinguishable from *Ward v. Strickland*, and, therefore, the rule must be

Discharged.

Feb. 8.

SMITH and Others v. BACKWELL.

Where Defendant pleaded delivery of a pipe of wine in satisfaction of the Plaintiff's demand, the Court refused to permit Plaintiff to sign judgment as for want of a plea, upon affidavit that the plea was false.

TO the Plaintiffs' demand in this action the Defendant pleaded the delivery by him and acceptance by the Plaintiffs of twenty pipes of port wine, in satisfaction.

Stephen Serjt., upon affidavit by one of the Plaintiffs, that the plea was wholly false, — that the Defendant never delivered, and Plaintiff never accepted, twenty pipes of port, or any other wine, or any other thing, in discharge of the Defendant's undertakings, — moved for a rule *nisi* to sign judgment as for want of a plea. After referring to *Blewett v. Marsden* (a), *Thomas v.*

(a) 10 East, 237.

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Vanderwoelen (a), *Bartley v. Godslake* (b), and *Shadwell v. Berthoud* (c), in which the Court of King's Bench had set aside sham pleas of judgment recovered, and the like, on affidavits of their falsehood, he relied on *Richley v. Proone* (d), where the plea resembled the present, being an allegation of a ton of hemp delivered, in satisfaction of the Plaintiff's demand; and though that case had subsequently been over-ruled by the case of *Merington v. Beckett* (e), yet as this Court was not bound by the practice of the Court of King's Bench, he urged them to adopt that which was the more wholesome rule, and supported by no less than five decisions: at least, the Defendant ought to be compelled to verify his plea by affidavit. Nothing could be more disgraceful to the law, or prejudicial to the interests of justice, than allowing defendants to delay a creditor, by putting falsehoods on record. In *Young v. Gadderer* (f), the only case in this court, the application failed, because it was not accompanied with an affidavit that the plea was false. A rule *nisi* having been granted,

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v.

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Spankie Serjt., contra, relied on *Merington v. Beckett*, in which all the preceding cases had been considered, and the Court of King's Bench, thinking they had gone too far, over-ruled *Richley v. Proone*. If the present application were acceded to, there would be an end of the system of special pleading, and the merits of all causes must be tried on affidavit. But the Court had no authority to call on parties to substantiate by affidavit the truth of matters they might advance in resisting a claim made against them. It was true, that when a party applied for leave to plead several matters, the Court were

(a) 2 B. & A. 197.

(b) 2 B. & A. 199.

(c) 5 B. & A. 750.

(d) 1 B. & C. 286.

(e) 2 B. & C. 81.

(f) 1 Bingh. 380.

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empowered to exercise a discretion as to what should be put on the record; but here there was no general issue, the Defendant had pleaded but a single plea, and the Court had no power to interfere. There was no affidavit that the plea had occasioned any delay, and the cause could not have been brought to trial sooner if the general issue had been pleaded, to which no objection could have been raised. The present application, therefore, went further than any that had preceded it.

Stephen. In *Thomas v. Vandermoolen* and *Bartley v. Godslake* there was no application for leave to plead several matters, and yet the plea was set aside.

PARK J. I am of opinion that the Court cannot do what has been required. I lament these things, because, from the affidavit which has been filed, and from the circumstance that it has met with no answer, I have little doubt that this is a sham plea. But we are asked to require that, which, except in one instance, has never been required, namely, that the Defendant should verify his plea by affidavit. There is nothing on the face of it, absurd or inconsistent in the allegation, that wine has been given in satisfaction of a demand. But in *Blount v. Marsden* a plea of satisfaction by judgment recovered in the Court of Piepoudre, was justly deemed a mockery, too glaring to remain on the records of the Court of King's Bench. *Richley v. Proone* was decided in one of those bye-sittings after the term had concluded, and was fully considered in *Merington v. Beckett*; and I entirely coincide with what fell from the Chief Justice in that case. In *Young v. Gadderer*, though there had been repeated promises to pay, the Court refused to set aside a plea of judgment recovered. There is great weight in the observation made on the part of the Defendant,

defendant, that there has been no application for leave to plead double; because upon such applications the Court is entitled to exercise a discretion, and that distinction was made in *Bones v. Punter*. (a) Here there is only a single plea; the defendant is under no rule to plead issuably, and we should exceed our jurisdiction if we acceded to the application.

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BURROUGH J. I object to this application *in toto*. By and by, it will be said that a Defendant must not plead the general issue without an affidavit of its truth: that is often as false a plea as the present; but the principle of our law is, that the Plaintiff must make out *his* case. With respect to pleas in abatement, the statute of *Anne* has required an affidavit of their truth; and if it had been thought fit to require an affidavit in other cases, it would have been easy to have so enacted it; but the absence of any such enactment, when the attention of the legislature had manifestly been called to the subject, shows that it was not deemed proper to extend the practice further.

GASELEN J. Perhaps it is necessary that something should be done to abolish sham pleading; but the Court cannot interfere upon the present occasion. Where the plea has raised different issues, has been exceedingly intricate, or has been a mockery of the proceedings of the Court, a discretionary power has sometimes been exercised by the Judges; but that cannot be done with respect to a single plea, which has nothing improper on the face of it.

Rule discharged.

The Court intimated, that in future similar applications should be discharged with costs.

(a) 2 B. & A. 777.
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Feb. 12.

TUCKER and Others, Assignees of JOHN ANTHONY GILBERT, a Bankrupt, v. JOHN HUMPHREY.

The shippers, acting for *G.*, purchased, and paid for with their own money, flour at *Stockton*, which was sent by a vessel to *London*, and the invoice forwarded to *G.* A manifest of the flour was also forwarded by the shippers to a wharfinger in *London*, whose practice it was to deliver goods to the consignee named in the manifest upon application, and till application to keep

it on board the vessel; if not applied for before the vessel returned, he landed it, and kept it in his warehouse, to the order of the shipper; if the goods were to be delivered to order, he delivered them to persons producing either bills of lading or the shipper's invoices. *G.* was in the habit of having flour consigned to him at the wharf, and sometimes sold it on board, sometimes when it was landed, and kept for him in the wharfinger's warehouses.

The flour in question arrived at the wharf on the 12th of *April*, but was not landed till the 22d; on the 17th, before any application by *G.*, who had become bankrupt, the flour was claimed under an order from the shippers: Held, that the flour not having been landed, nor any application having been made by *G.*, the shippers might stop *in transitu*.

PARK J. This case came before the Court upon a motion to set aside an award, in part, of a learned barrister, and which the Court, for the importance of it, desired might be argued as a special case. The action was an action of trover, and it had been referred by an order of the Chief Justice, since made a rule of Court, to the award of Mr. *Archbold*. The claim was for three several parcels of flour; one for the value of 260*l.* 10*s.* for which the arbitrator decides that the Plaintiffs are to recover: one for fifty sacks; and he decides that for those the Plaintiffs are not to recover: and upon these two points no question now arises. The third parcel consisted of twenty-five sacks of flour, amounting to 52*l.* 10*s.*; and as to these, the arbitrator states a variety of facts, upon which he wishes to take the opinion of the Court, and which is the point upon which the argument has been had. The question is, Whether Messrs. *Wilkinson*, the shippers of the flour, had a right to stop it *in transitu*, under the circumstances of the case. The facts found by the arbitrator are these:—

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" The twenty-five sacks in question were purchased by Messrs. *Wilkinson and Company of Stockton*, for the said *John Anthony Gilbert*, with their own money: they charged no profit upon them, but merely a commission of 1s. per sack for purchasing them; and they shipped them together with the remainder of a cargo of other goods, by a vessel named the *Cumberland*, bound for *London*. This vessel was consigned by Messrs. *Wilkinson and Company* to the Defendant's wharf, and they sent to the Defendant by post a manifest of the cargo; they sent also to *Gilbert* an invoice of these twenty-five sacks of flour, stating them to be bought and shipped for him on his account and risk. When a ship was thus consigned by Messrs. *Wilkinson and Company* to the Defendant's wharf, they always sent a manifest of the cargo to the Defendant by post, and in this manifest the different items of the cargo, and their marks, &c. were inserted, and opposite to each item either the name of the consignee or the words to order were written. When such vessel arrived at the wharf, those goods to which the consignee's name was annexed to the manifest, were delivered to such consignee or his order, upon application; and those to which the words *or order* were opposite in the manifest, were delivered to the order of *Wilkinson and Company*, that is to say, to persons producing either bills of lading for the goods, or *Wilkinson and Company's* invoices of them respectively. Flour thus appearing to be shipped to order by the manifest, was always left on board the vessel, and not landed until such bill of lading or invoice was produced; but if no such bill of lading or invoice was produced by the time the vessel began to take in her return cargo, then the flour was landed and placed in the Defendant's warehouses, and there kept to the order of the shippers, *Gilbert*, the bankrupt, was in the habit of having flour shipped for him from

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Stockton, and which came to the Defendant's wharf, and *Gilbert* always in such cases either sold it on board before it was landed, or it was landed and kept for him in the Defendant's warehouses until he sold it, so that the Defendant's wharf was always deemed the place of its destination. The twenty-five sacks of flour in question were shipped on board the *Cumberland*, on the 5th day of *April* 1824, and arrived at the wharf on the 12th, but were not landed until between the 22d and 26th of the same month. On the 17th day of the same month an order from *Wilkinson* and Company, directed to the Defendant, requiring him to deliver their twenty-five sacks of flour to Messrs. *Atkinson* and *Cramp*, was produced to the Defendant by *Cramp*, and the flour was then claimed by *Cramp* on the part of *Wilkinson* and Company. *Gilbert*, at that time, was a bankrupt. He had committed an act of bankruptcy on the 10th day of *April* 1824; on the 14th a commission of bankrupt was thereupon issued against him, and on the 19th day of the same month the messenger under that commission produced to the Defendant the invoice of the twenty-five sacks of flour in question, which had been sent by *Wilkinson* and Company to *Gilbert*, as before mentioned, and demanded the flour, which was refused to him. Messrs. *Atkinson* and *Cramp* afterwards landed the flour, and sold it for the account of *Wilkinson* and Company. The parties to this action have consented, that in case his Majesty's Court of Common Pleas shall be of opinion, that, under the circumstances hereinbefore stated, the Plaintiffs are not entitled to recover for the value of the said last-mentioned parcel of flour, consisting of twenty-five sacks as aforesaid, then and in such case my award in favour of the Plaintiffs, for the value of the said first and last parcels of flour above mentioned, amounting to the sum of 815*l.*, shall be reduced

deduced by the amount of the value of the said last-mentioned parcel, that is to say, the sum of 52*l.* 10*s.* aforesaid."

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Upon these facts it was contended by Mr. Serjt. *Edward Davies*, on behalf of the assignees, that by the arrival of the ship at the wharf the transit was over; that the wharf, though the goods were not delivered out of the hold of the ship, was to be considered as the warehouse of *Gilbert*, the bankrupt, just as much as if the cargo had been removed into one of the warehouses of the wharf, and had been marked by the bankrupt, warehoused in his name, or put under his lock and key.

This has been well argued on both sides, and nobody can doubt that if such a state of things, as is above supposed had existed, such as the goods being put into a warehouse on the wharf, which the bankrupt, having no warehouse of his own, had been in the habit of using as his own, and marking or doing some act upon them, the transit would have been over. But the question is, whether that be the state of things.

The general nature of the right to stop *in transitu* has very properly not been argued; for although, comparatively speaking, such right has not been long known to the common law, perhaps not above seventy years, having been at that time transplanted from the courts of equity, yet it has since been established by such a variety of decisions, that it is now regarded with favour by the former as a right which they are always disposed to assist, not proceeding at all on the ground of the contract being rescinded by the insolvency or bankruptcy of the consignee of the goods, but as an equitable right adopted for the purposes of substantial justice. But this case has been correctly argued upon the ground whether the *transitus* was continuing, or whether it was at an end and determined. Every case of this sort must depend on its own special circumstances. In some

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of the earlier cases, particularly in that of *Haister v. Deale*, Lord *Manfield*, who carried the doctrine of stoppage in transitu a great way, seemed to expect that the goods must come to the actual corporal touch of the vendee; but, in the subsequent case of *Disson v. Baldwin*, 5 East, 184., Lord *Ellenborough* repudiates that extent of the doctrine, and puts it upon a better footing, and says, "the question is, whether the party, to whose touch it actually comes, be an agent so far representing the principal as to make the delivery to him so full, effectual, and final delivery to the principal, as contradistinguished from a delivery merely to a person acting as a carrier or mean of conveyance to or on account of the principal in a mere course of transit towards him. I cannot but consider the transit completely at an end in the direct course of the goods to the immediate, and that they were afterwards under the immediate orders of the vendee."

Apply that latter principle to this case, and supposing merely for argument that these goods had actually arrived on the wharf, yet were they ever under the immediate orders of the vendee?

On the contrary, the flour in question had arrived at the wharf on the 12th, but was not landed till the 22d of the month of April: no act of ownership exercised over it by *Gilbert*; no invoice, no bill of lading, was produced by him, or any agent employed on his behalf, till the messenger under the commission claimed it on the 19th of the same month, the shipper having actually stopped it two days before; so that the very first act done upon this flour after the ship's arrival at the wharf, was done by the shipper before the transit to the hand or possession of the vendee was complete.

Nothing, however, that I have hitherto said means to impeach the doctrine, first broached by the late Mr.

Justice

Justice *Chambre* in *Richardson v. Goss* (a), adopted and approved by Lord *Albany*, when Chief Justice of this court, in *Stodd v. Pettit* (b), and lately by my brother *Blyden* in the case of *Foster v. Frampton* (c). The doctrine was this, to which I, speaking only for myself, with this point, fully accedes, — that if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and disposes of them there, the *transitus* will be at an end when the goods arrive at such warehouse.

In the first of these cases the trader had no warehouse of his own, but used that of his packer for receiving goods consigned to him, and it was held that the *transitus* of such goods was at an end upon delivery of them to the packer.

In *Lush v. Frampton* the vendee of several hogsheads of sugar, upon receiving notice of their arrival, took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse till he should receive further direction: it was held upon the bankruptcy of the vendee, that the *transitus* was at an end, and the vendor could not stop them: so here, if *Gibbert* had taken samples of the flour, or done any other act exerting his authority over them, that would have varied the case; but no such facts, nor any facts amounting to these, are found upon this award.

I forbear to go through all the mass of cases which have been decided on this subject, because they would only fatigue the Court, and delay the other important business of the term. I believe all of them were quoted on one side or the other by the learned counsel. (a) I have

(a) 3 *Bor. & Pull*, 129.

(b) *Ibid.* 469.

(c) 16 *B. & C.* 109.

(d) *E. Lawes* Serjt. for the Plaintiffs, after distinguishing

Loshman v. Williams, 4 *Campb.* 181. relied chiefly on *Richardson v. Goss*, 3 *B. & P.* 127. *Scott v. Pettit*, 3 *B. & P.* 469. *Rouse v. Pickford*, 8 *Taunt.* 83. and *Foster*

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have looked at all of them, and the doctrine established by one is not impugned by any of them.

One point only remains to be considered. It is supposed that the fact found by the arbitrator, viz. that *Misars. Wilkinson*, when they shipped the flour, sent an invoice thereof to *Gilbert*, made an essential difference, and gave him, by virtue of the invoice, a perfect control over them.

But this surely cannot be meant, as a serious objection; even a bill of lading, while in the hands of the original consignee, unindorsed, cannot interfere with the vendor's right to stop the goods before they arrive into the possession or under the control of the consignee, if he become bankrupt or insolvent. If indeed the consignee assign the bill of lading to a third person for a valuable consideration *bona fide*, without notice of such circumstances as render the bill of lading not fairly and honestly assignable, the right of the consignor as against such assignee is divested; for a bill of lading so as above indorsed, transfers the property.

But I have never before now heard it contended, except once, that the mere possession of an invoice, which is only a mercantile name for a bill of parcels, or a shop bill, could bar the vendor's right.

The very contrary to this has been decided in a case of *Akerman v. Humphrey*, tried before my Brother Burrough in December 1823, 1 Carr. & P. 53., where my learned Brother decided that the delivery of a shipping note by the consignee of goods to a third person, with

ter v. Frampton, 6 B. & C. 109.
 and
Wilde Bant. for the Defendant,
 on *Crawshaw v. Eades*, 1 B. &
 C. 181. and *Akerman v. Hum-*
phrey, 1 Carr. & P. 53.
Lawes in reply cited *Burward*

v. Capel, 4 Bing. 137. to show
 that a ship attached to a wharf
 may be considered as a warehouse.
 But the subject being so fully
 discussed in the judgment, it has
 been thought unnecessary to
 repeat the argument.

detainer to the wharfinger to deliver the goods to such third person, did not pass the property in them so as to prevent a stoppage *in transitu* by the consignor.

A verdict, therefore, upon the opinion of my Brother *Burroughs*, passed for Defendant, with liberty for Plaintiff to move to enter a verdict for him. Mr. Serjt. *Taddy* accordingly made such motion; but Lord *Gifford*, then Chief Justice, and myself thought the opinion delivered by the learned Judge at the trial was correct, and no rule was granted.

That opinion applies most pointedly to the present case; for it is there stated that a shipping note and a delivery order to the party made no change of property; that they did not amount to a bill of lading, which is exactly like a bill of exchange, and the property mentioned in it passes by indorsement, but not by delivery without indorsement. The shipping note, from its nature, is not indorsable, and in point of fact neither the shipping note in that case nor in this is indorsed.

For these reasons we are of opinion that the award is good upon the two first points, but bad upon the third; that is, that the consignor had a right to stop the twenty-five sacks *in transitu*.

BELL v. JACOBS.

Feb. 4.

ON the motion of Jones Serjt. the Court granted a rule nisi to set aside the bail-bond in this case, on the ground that the Defendant had been arrested in the *Tower Hamlets* by virtue of a writ which had no *omittas* clause. The Court refused to set aside a bail bond on the ground that the Defendant had been arrested in the *Tower Hamlets* by virtue of a writ which had no *omittas* clause.

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Bail

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non omittas clause. *Jones* referred to *Winter v. Miles* (a) and *Batson v. M'Clean* (b), where Lord Ellenborough held that an arrest in the Tower under such a writ would be bad; but the Court entertained a strong impression against the application.

Wilde Serjt., who shewed cause, alleged that bail having been put in, the objection was waived; to which

Jones answered that the bail had been put in since the rule *nisi* was granted, and that the Court would decide upon the state of the cause at the time of the motion; and he argued that though the omission of a *non omittas* might not be material where a franchise was in the hands of a subject, yet that it was fatal where the franchise was in the crown.

PARK J. There is no colour for this application on the part of the Defendant. If the privileges of the crown have been improperly invaded those who have the care of such privileges will apply for redress. *Fitzpatrick v. Kelly* (c), where the previous authorities were considered, has settled the point, which was fully entered into by Lord Kenyon in *Rex v. Stobbs*, (d). *Winter v. Miles* was the case of the execution of a *feri facias* in Kensington Palace, and though the King did not reside there, yet as the palace was his, and he might resort to it at any time, it was held an invasion of privilege which could not be supported. As to the language of Lord Ellenborough in *Batson v. M'Clean*, no doubt an arrest in the Tower, without proper process, is bad, if the authorities there choose to object; but it does not follow

(a) 10 East, 578.

(b) 2 Chit. Rep. 48. 51.

(c) In the argument of *Rex v. Stobbs*, 3 T. R. 740.(d) *Ibid.*

(that the defendant may take the objection, and be discharged from the arrest.

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v.

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Bramough J. The point was determined in *Fitzpatrick v. Kelly*, after an able argument.

GASKELL J. There is no ground for us to interfere on the application of the Defendant. In *Sparks v. Spinks* (a) the same point was determined; and it was said that if those who have jurisdiction are injured, it is for them to complain.

Rule discharged with costs.

(a) 7 Taunt. 311.

GULLY and Others v. The Bishop of Exeter and DOWLING.

Feb. 11.

QUARE *impedit* by devisees of *William Slade Gully*, who purchased the next presentation to the rectory of *Berrynarber*, county *Devon*, from *Joseph Davie*, now *Joseph Davie Bassett*, Esq. claiming to be entitled to the advowson for every fourth turn, under a grant of 29th April 1672, from *Robert Isaac*, grandson and heir (in coparcenary with his three aunts) of *Richard Roberts*, against *Rev. George Pyke Dowling*, claiming such fourth turn under a marriage settlement subsequently made by the said *Robert Isaac*, dated 4th April 1692.

The Plaintiff in *quare impedit* having traced his title through a period of two centuries, and the Defendant having, in forty-three pleas, taken issue on every allegation in the declaration, though

the Plaintiff's claim rested solely on the validity of a deed of 1672, and the Defendant could have no writ to the bishop, unless he succeeded in setting aside that deed, the Court, after the declaration had been amended twice, and after trial had, rescinded the rule to plead several matters.

This

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GULLY

The Bishop of
EXETER.

This was the second avoidance under the fourth turn since the descent of the advowson in coparcenary.

The following is an abstract of the pleadings, which were of unusual length.

DECLARATION.

PLEAS.

Easter term, 7 G. 4. C. P.

Richard Roberts, seised of advowson of *Berrynarber* in gross, presented *William Herle*, 29d. May 1609.

25th Dec. 1622. Death of *Richard Roberts*.

Descent of advowson to *Mary Westcott*, *Jane Squire*, *Prudence Amory*, and *Grace Isaac*, as daughters and co-heirs.

27th Jan. 1630. Vacancy by death of *William Herle*. Coparceners not agreeing, it belonged to *Mary Westcott* and her husband to present, and they presented *George Westcott*.

Descent of first turn to *Richard Hill*, son of *Mary Hill*, daughter of *Mary Westcott*.

Descent of second turn to *Christopher Squire*, son of *Jane Squire*.

Descent of third turn from *Prudence Amory*, to *William* her son, and from him

41st plea. That purparty of advowson did not descend to *William Amory* as son

DECLARATION. PLEAS.
him to *Frances Gibbon* and son and heir of *Prudence*
Prudence Barnes, his daughter. *Amory*.
ters.

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Descent of fourth turn
to *Robert Isaac*, son of
Grace Isaac.

10th July 1674. Vacancy
by death of *George Westcott* (the first incumbent
after the descent in coparcenary).

11th July 1674. Presentation of *Thomas Westcott* by *Grace Westcott*,
lawfully, or usurping upon
Jane Squire (it not being
the *Westcotts'* turn).

10th Sept. 1674. Vacancy by death of *Thomas Westcott* (second incumbent
after the descent in coparcenary).

24th Sept. 1674. Presentation of *Henry Chichester*, by *Frances Gibbon*
and husband.

29th April 1672. Deed poll of *Robert Isaac*, granting to *Lewis Stevings* and heirs fourth part or purparty of advowson in consideration of 20s., and of true and faithful service, and for other considerations.

1st plea. Deed-poll, not the deed of *Robert Isaac*.
2d plea. *R. Isaac* did not grant by deed-poll.
3d plea. *R. Isaac* did not grant for consideration mentioned in deed-poll.
4th plea. Consideration of 20s. not paid, nor service

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GULLY

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Exeter

DECLARATION.

AND REPLY

vice performed to *Robert*,
nor was grant made *Robert*,
side for those and the other
considerations mentioned
in deed.

5th plea. *Robert*, *Robert*
tis, insane, and incapable
of granting by deed-poll.

6th plea: Deed-poll made
for purpose of defrauding
those who should purchase
purparty. That *Robert*
conveyed purparty by mar-
riage settlement of 4th
April 1692, under which a
title is deduced to the De-
fendant *Doming* bride to

43d plea. Admitting
expressly the title of *Ro-
bert Isaac*, and admitting
by protestation the other
allegations of declaration
sets out Defendant's title
under settlement of 4th
April 1692, as in
plea, by way of inducement,
and traverses, without this,
that the purparty was
granted or passed by deed-
poll of 29th April 1679.

7th plea. *Lewis Stevinge*
did not die seized leaving
John Stevinge and *Richard*
Stevinge, his sons, him sur-
viving.

Death of *Lewis Stevinge*,
seized of purparty, leaving
John Stevinge and *Richard*
Stevinge, his sons, him sur-
viving.

Descent

8th

DECLARATION.

Deceased of purparty to *John Stevings*, as son and heir, who thereupon became seised.

5th Jan. 1699. Grant of writ of avoidance by *John Stevings* to *Henry Chichester* (the incumbent), by indenture delivered to *Henry Chichester*, and therefore not in possession of Plaintiffs, who produce counterparty.

11th Nov. 1714. Vacancy by death of *Henry Chichester* (third incumbent after deposition of a parsonary).

6th Nov. 1714. Presentation of *Edward Chichester*, by *Sir Nicholas Hooper*, lawfully, or by usurpation on representatives of *Henry Chichester*, grantee of that avoidance.

1st Jan. 1719. Death of *John Stevings*, having by will dated 10th Aug. 1705, devised purparty to his brother *Richard*, if living at time of testator's death; and in case of *Richard's* death, to his children as tenants in common. That *Richard* having died leav-

ing

PLEAS.

8th plea. Purparty did not descend to *John Stevings* as son and heir, nor did he become seised.

9th plea. *Non est factum*, *John Stevings*.

10th plea. Indenture not sealed, and delivered by *John Stevings*, and afterwards delivered by him to *Henry Chichester*.

11th plea. *John Stevings* did not grant by indenture to *Henry Chichester*.

12th plea. *John Stevings* did not make his will.

13th plea. *John Stevings* did not devise.

14th plea. Six persons mentioned in declaration as daughters of *Richard Stevings*, were not children and only children of *Richard Stevings*.

15th

1699
GRANT
The Bishop of
Exeter

1822.

GULLY

v.

The Bishop of
Exeter.

DECLARATION.

ing six daughters, they and their husbands became seised as tenants in common.

1st Sept. 1719. Death of *John Bowen*, one of the husbands of the six daughters of *Richard Stevings*.

20th Dec. 1719. Grant by *Bowen's* widow and her five sisters, and their husbands, by indenture inrolled in Chancery, to *Robert Incledon* and *Edward Fairchild*. Fine to be levied to the use of *Maunsell* and *Andrews* (two of the nieces' husbands), *Incledon* and *Fairchild*, in trust for sale, after the suffering of a recovery of other premises, which was suffered.

Hilary term, 6 G. 1. Fine levied between *Robert Incledon* and *Edward Fairchild*,

PLEAS.

15th plea. Six daughters of *Richard Stevings* were not married to their supposed husbands.

16th plea. Six daughters and their husbands never were seised of the purparty.

36th plea. Indenture of 20th Dec. 1719, not the deed of *Bowen's* widow and others.

37th plea. *Bowen, widow*, and others, did not, in pursuance of articles, and in consideration of, &c. grant to *Incledon* and *Fairchild* by said deed.

38th plea. Nothing passed by said deed from *Bowen, widow*, and others, to *Incledon* and *Fairchild*.

18th plea. Fine not declared to enure to use of *Maunsell, Andrews, Incledon*, and *Fairchild*.

39th plea. *Nul tiel* record of recovery.

17th plea. *Nul tiel* record of fine.

19th

DECLARATION.

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~~and~~ Plaintiffs, and *Bowen*,
widow, and others, De-
fendants.

Death of *Fairchild* seised,
leaving *Maunsell*, *Andrews*,
and *Incedon* him surviving.

19th plea. *Fairchild*
did not die seised, leaving
Maunsell, *Andrews*, and
Incedon him surviving.

10th and 11th Nov. 1731.
Lease and release of pur-
party from *Maunsell*, *An-
drews*, and *Incedon*, to *John
Davie*.

20th plea. Indentures of
10th and 11th Nov. 1731.
not the deeds of *Maunsell*,
Andrews, and *Incedon*.

21st plea. Nothing passed
by said indentures.

1st Jan. 1770. Death of
John Davie, leaving *John*
his eldest, and *William* his
second son, having by will
of 19th June 1760, devised
next turn to his son *William*.

22d plea. *John Davie*
did not make will *modo et
forma*.

23d plea. *John Davie*
did not devise next turn
to his son *William*.

Descent of reversion of
purparty to *John Davie* the
son.

24th plea. Purparty did
not descend, nor any re-
versionary interest therein,
to *John Davie* the son.

23d and 24th April 1777.
Lease and release of next
turn from *William Davie*,
to his brother *John Davie*
the son.

25th plea. Lease and re-
lease not deeds of *W. Davie*.

26th plea. Nothing pass-
ed by indentures.

2d Jan. 1790. *John
Davie* the son died seised,
having by will of 2d Sept.
1788, devised purparty to
Joseph Davie his son.

27th plea. *John Davie*
the son did not die seised.

28th plea. *John Davie*
the son did not make will.

29th plea. *John Davie*
the son did not devise.

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DECLARATION.

PLEAS.

40th plea. A special plea setting out the devise, to which there was a replication and demurrer by Defendant to replication.

5th May 1731. Vacancy by death of *Edward Chichester*, and presentation of *Robert Bluett* by *Richard Hill* (being second presentation in respect of the first turn under *Mary Westcott*, the eldest coparcener).

27th Feb. 1749. Vacancy by death of *Robert Bluett*, and presentation of *John Seddon* by *James Pearce* and *Mary* his wife, as in second turn, lawfully, or by usurpation upon persons entitled under *Jane Squire* (the second coparcener).

4th February 1780. Vacancy by death of *John Seddon*, and presentation of *Powell Edwards* by *Thomas Edwards*, as in their turn, lawfully, or by usurpation upon persons entitled under *Prudence Amory*, the third coparcener.

6th July 1814. Grant by *Joseph Davie* (then, and

now

30th plea. *Non est factum Joseph Davie*.

31st

DECLARATION.

now *Joseph Davie Basset*),
of next avoidance to *Wil-*
liam Slade Gully.

15th March 1816. *Wil-*
liam Slade Gully made his
will, and thereby devised
the next avoidance to
Plaintiffs; and appointed
Jenefer Gully, *Anne Powne*
Gully, *Samuel Thomas Gully*,
and *Peter Thomas Gully*,
executors and executrixes.

16th Nov. 1816. *W. S.*
Gully died.

5th April 1825. *Samuel*
Thomas Gully proved will,
and assented to bequest
of next presentation to
Plaintiffs.

30th Oct. 1825. Va-
cancy (still existing) by
death of *Powell Edwards*,
the last incumbent, being
the first avoidance after the
grant to *W. S. Gully*,

Whereby it belonged,
and doth belong, to
Plaintiffs to present, but
they are hindered by De-
fendants.

PLEAS.

31st plea. *Joseph Davie*
did not grant.

32d plea. *W. S. Gully*
did not make will.

33d plea. *W. S. Gully*
did not devise.

42d plea. *Jenefer Gully*,
Anne Powne Gully, *Samuel*
Thomas Gully, and *Peter*
Thomas Gully, never were
executors and executrixes
of *W. S. Gully*.

34th plea. *Samuel Tho-*
mas Gully did not assent
to bequest before action
brought.

35th plea. Neither *W.*
S. Gully, nor any of his
ancestors, nor any person
under whom he claims after
the said *Robert Isaacs*, were
or was seised of the said
purparty,

Without this, that Plain-
tiffs became or were pos-
sessed of the next avoid-
ance and right of present-
ation on the death of the
said *Powell Edwards*, *modo*
et forma.

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The declaration in the cause was delivered in *January* 1826. After several applications for time, thirty-five pleas were, upon a rule to plead several matters, put in in *December* following. In consequence of the matters contained in those pleas it became necessary to amend the declaration twice, which was done by the 5th of *February* 1827. The Defendant then having obtained leave to plead *de novo*, put in eight more pleas, which did not all apply to the amendments; but obtained no new rule to plead several matters. The Plaintiff obtained various orders for time to reply, and, having made up the issue, took the cause down to trial at the Spring assizes 1827; and though he was nonsuited, the nonsuit was set aside, and a rule for a new trial made absolute in the ensuing *Trinity* term. (a) In the same term, on the 4th of *July*, a rule was obtained for discharging the rule to plead several matters, and for reforming and curtailing the pleadings. Upon this rule the pleadings were, by consent, referred to Mr. Justice Gaselee, who struck out twenty-two pleas, and altered seven, but allowed either party six days for giving notice of taking the opinion of the Court. The Plaintiff gave notice accordingly, and the case was mentioned to the Court early in last *Michaelmas* term, but *Best* C. J. being absent from the court, the matter was, by the desire of the Court, postponed to this term; when

Wilde Serjt., upon an affidavit stating the foregoing facts, moved for a rule to rescind the original rule for pleading several matters, or to amend the declaration, by adding a count stating that the daughters of *R. Stevings* took by descent, instead of devise, they being coheiroesses of *J. Stevings*, as well as devisees, and the title being substantially the same. He urged that the Plaintiffs and the

(a) See *Ante*, 293.

Defendant

Defendant *Dowling*, both claiming under *Robert Isaac*, the former under a deed of 1672, and the latter under a subsequent deed of 1692, it was quite clear that if the deed of 1672 were established, the Defendant could make no title, and could not have a writ to the bishop; the Plaintiffs, therefore, proposed that all the pleas, except such as related to the deed of 1672, should be struck out, as being wholly immaterial to the Defendant, for he could not make out a title under any other plea either as they now stood or by any alteration whatsoever.

In all the pleas except the first, second, third, fourth, fifth, sixth, and forty-third, which referred to the deed of 1672, he contended, that not only no title was attempted to be set out in the Defendant, but the nature of the pleas was such that no title could be set out, because all the Defendant's pleas, except the seventh, admitted the validity of the deed of 1672, which put the Defendant, who claimed only in respect of the invalidity of that deed, out of Court. The added pleas not applying to the amendments, a new rule to plead several matters ought to have been obtained.

E. Lawes Serjt. shewed cause against the rule; and, after objecting that the Plaintiffs' application to rescind the rule for pleading several matters came too late when the declaration had been amended twice, when the cause had actually been tried, and nearly two years had elapsed since the writ was sued out, proceeded to support the pleas. None of them were superfluous; not even those which pleaded *non concessit* and *riens passa* in addition to *non est factum*; for it was very doubtful whether a stranger to a deed could plead *non est factum*, *Bro. Abr. Estranger al fait*, pl. 4., *Taylor v. Needham (a)*, *Gilb. on Debt*, 437. But it was clear that the same matter might be pleaded several ways; *Lord Clinton v. Morton (b)*,

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(a) 2 Taunt. 278.

(b) 2 Str. 1000.

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Ward v. The Charitable Corporation. (a) With the exception of four, all the pleas raised issues on allegations in the declaration which the Court could not refuse to the Defendant the privilege of disputing; and the Court had repeatedly refused to strike out pleas unless a clear case of vexation were made out; they would never interfere where the matter was doubtful or difficult: *Trickey v. Yeandall.* (b) In *Brindley v. Dennett* (c), and *Thomas v. Jackson* (d), they held such applications more vexatious than numerous pleas or counts, which they refused to strike out after they had been engrossed of record. The present case, from the length of the declaration alone, was one of great difficulty. If the Plaintiff had any title (and he might make it appear after trial), he was entitled to a writ to the bishop, (*Com. Dig. Pleader*, 3 I. 11., *Fitz. N. B.* 30 K., *Rast. Entr.*, *Qu. Imp. Evesq.* 2.) and the Plaintiff could not say that because the Defendant had failed in making out a title, the Plaintiff had therefore succeeded: *Tufton v. Temple.* (e) As to the supposed omission of a second application for leave to plead several matters, it was immaterial, if stated on the record, and not traversed; and in *Bartholomew v. Ireland* (f) it was held that the omission of such statement on the record was no ground of demurrer. With regard to the proposed amendment of the declaration, the Plaintiff in *quare impedit* could only state one title in his writ; *Buckmere's* case (g); or declaration; *Com. Dig. Action, G., Bro. Abr. Double Pleas*, 7, 8, 9. But to claim by descent was a title altogether different from a claim by devise.

THE COURT took time to look into the authorities, and this day, stopping *Wilde*, who was to have sup-

(a) *Rep. Temp. Hardw.*
126, 127.

(b) 1 *Bingb.* 66.

(c) 2 *Bingb.* 124.

(d) 2 *Bingb.* 453.

(e) 1 *Vaugh.* 8.

(f) *Andr.* 108.

(g) 8 *Rep.* 37 b.

ported

ported the rule, made it absolute to amend the declaration as the Court should direct, *and* to rescind the rule for pleading several matters. The latter, on the ground (as was collected from what fell from the learned Judges during the argument) that, legally speaking, the Court had been imposed upon in the use that had been made of that rule, though no unfair intention was imputed.

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Rule absolute accordingly.

RUNDLE v. BEAUMONT.

Feb. 12.

THIS was an action on a charter-party against the charterer for freight and demurrage.

In an action on a charter-party against a charterer, the Court refused to compel the Plaintiff to allow the Defendant an inspection of the ship's log-book.

Jones Serjt., on behalf of the Defendant, moved for a rule *nisi* to compel the Plaintiff to allow Defendant to inspect the log-book of the ship, on affidavit that he considered it material to his defence. The Court, he submitted, could order an inspection of any document which one party in a cause might be deemed to hold as trustee or for the benefit of the other: *Ratcliffe v. Bleasby*. (a) The log-book was kept for the benefit and instruction of all parties interested; as much for the charterer as for the owner. It was evidence of the facts stated in it; *D'Israeli v. Jowett* (b), *Watson v. King* (c); and inspection was commonly granted in actions on policies of insurance.

A rule *nisi* having been granted,

(a) 3 *Bingh.* 148. (b) 1 *Esp.* 427. (c) 4 *Campb.* 275.

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... *Wilde Serjt.* shewed cause. The charterer has no interest in the log-book, which is the mere memorandum of the captain of the ship. It is not a public document, nor evidence for any one. In *D'Israeli v. Jowett* the book had been deposited in the admiralty, and so became a public document, and in insurance cases the production of the log-book, when required, is stipulated for as a part of the terms of the rule to consolidate several actions. In the *Mayor of Southampton v. Graves* (a) the Court refused inspection of the books of the corporation.

Jones. The log-book is recognized as a public document in all books of marine law; and in cases of insurance, inspection has frequently been allowed of all papers in the adverse party's possession relating to the cause. *Goldschmidt v. Marryatt.* (b) No inconvenience can arise from compelling the production of the book, and in *Clifford v. Taylor* (c), *Mansfield C. J.* said, "This practice of compelling the delivery of copies is very convenient, for it saves the delay and expence of a bill in equity."

PARK J. There is no pretence for this application; and we should not have granted the rule *nisi* if a case had not been cited to shew that a log-book is evidence. But in *D'Israeli v. Jowett* the log-book was brought from the admiralty, and was a public document. If we were to accede to the present application we must overrule our decision the other day in *Rowe v. Howden.* (d) Nothing has been stated on affidavit to shew the materiality of the production of this book; the inconvenience that would result from withholding it; or the

(a) 8 T. R. 590.

(b) 1 Campb. 562.

(c) 1 Taunt. 167.

(d) See next page.

interest

interest of the party applying. The law has been so clearly laid down in *Ratcliffe v. Bleasby* that I thought it never would be stirred again.

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(d) ROWE and Others v. HOWDEN.

Feb. 7.

THIS was an action by ship-owners against their broker.

Jones Serjt. moved that the Defendant might exhibit, in order to the Plaintiffs copying it, a certain letter which had come to the Defendant's hands, touching an adventure in which the ship was to have been employed.

Wilde Serjt. who shewed cause, relied on *Ratcliffe v. Bleasby* (a), contending that this was a document belonging to the Defendant, which there could be no pretence for saying he held in trust for the Plaintiffs, and that it was not even alleged to be necessary to enable the Plaintiffs to declare.

Jones. The Defendant has the letter in virtue of the confidence reposed in him by the Plaintiffs; it regards the business of the ship, and the Plaintiffs have, therefore, as great an interest in it as the Defendant. Indeed, the Defendant being no other than the Plaintiffs' agent, they, as principals, are entitled to claim the letter; but where the Plaintiff has an interest in the paper he is entitled to a copy, whether a confidence have been reposed in the holder of it or not; *Bateman v. Phillips* (b), *Gigner v. Bayly*. (c)

PARK J. There is no ground whatever for this application, and if we were to accede to it, we should be flying in the face of the decision of this Court in *Ratcliffe v. Bleasby*. The Plaintiffs make no affidavit that they cannot declare without a sight of the letter in question; and they call on this Court to assume the jurisdiction of a court of equity, and aid them in a fishing bill. They may give notice to the Defendant to produce the letter at the trial, but they cannot compel him to produce what may be his evidence. Where parties have a common interest in a paper, and a Plaintiff cannot declare without an inspection of it, the question is a very different one, and, therefore, the case of *Gigner v. Bayly* does not apply. There the Plaintiff had bought lands of the Defendants through the medium of an auctioneer, and called on them to produce the contract for the purpose of stamping it, to enable him to sue them for not performing the contract.

BURROUGH J. I refused this application at Chambers, because it seemed to me to be only fishing for evidence.

GASKLEE J. concurred with the rest of the Court in Discharging the rule.

Plaintiffs, ship-owners, sued Defendant, their broker. The Court refused to compel him to give a copy of a letter which he had received, touching an adventure in which the ship was to have been employed.

(a) 3 Bingh. 148.

(b) 4 Taunt. 157.

(c) 5 B. M. 71.

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BURROUGH J. Perhaps the case might stand on a different footing if the log-book were evidence *per se*; but it is only evidence to contradict a witness who has kept it. In equity a bill for discovery furnishes distinct ground for granting what is required; but no grounds have been stated on the present occasion.

GASELEE J. We cannot carry this rule further than in *Ratcliffe v. Bleasby*; this application, therefore, must fail.

Rule discharged.

(IN THE EXCHEQUER CHAMBER.)

Feb. 11.

The Trustees of the BRITISH MUSEUM v. PAYNE and Foss.

A part of a work, to which there were twenty-six subscribers, and of which only thirty copies were printed, — published at intervals of several years, at an expense exceeding the sum to be obtained by the price of the copies, and which expense was defrayed

by a testamentary donation, was holden not to be a book demandable by the British Museum under 54 G. 3. c. 156.

DEBT. The first count of the declaration stated that the Defendants, on the 10th January 1825, were the publishers of a book entitled *Flora Græca*, (&c.) first published, advertised, and offered for sale, within the bills of mortality, on that day, at the price of 12*l.* 12*s.*, which book was demandable under the 54 G. 3.; that the Defendants did not, within one calendar month after the day of publication, enter the title to the copy of the book, and the names and place of abode of the Defendants, so being the publishers, in the register book of the Company of Stationers, as had been usual before the passing of the act, with respect to books, the title whereof had theretofore been entered in such register-book, whereby they forfeited for their offence, 5*l.* and

eleven

eleven times the price at which the book was sold :
whereby *actio accrevit*.

There were many other counts, but the judgment of
the Court did not turn on the form of the pleadings.

Plea, *nil debent* and issue.

By 54 G. 3. c. 156. s. 2. it is enacted, that " eleven
printed copies of the whole of every book, and of every
volume thereof, and upon the paper upon which the
largest number or impression of such book shall be
printed for sale, together with all maps and prints be-
longing thereto, which, from and after the passing of this
act, shall be printed and published, on demand thereof
being made in writing to or left at the place of abode of
the publisher or publishers thereof, at any time within
twelve months next after the publication thereof, under
the hand of the warehouse-keeper of the Company of
Stationers, or the librarian or other person thereto
authorised by the persons or body politic and corporate,
proprietors, or managers of the libraries following, viz.
the *British Museum*, *Sion College*, the *Bodleian Library*
at *Oxford*, the *Public Library* at *Cambridge*, the *Library*
of the *Faculty of Advocates* at *Edinburgh*, the *Libraries*
of the four *Universities* of *Scotland*, *Trinity College*
Library, and the *King's Inns' Library* at *Dublin*, or so
many of such eleven copies as shall be respectively de-
manded on behalf of such libraries respectively, shall be
delivered by the publisher or publishers thereof re-
spectively, within one month after demand made thereof
in writing as aforesaid, to the warehouse-keeper of the
said Company of Stationers for the time being ; which
copies the said warehouse-keeper shall, and he is hereby
required to receive at the hall of the said company, for
the use of the library for which such demand shall be
made, within such twelve months as aforesaid ; and the
said warehouse-keeper is hereby required within one
month after any such book or volume shall be so de-
livered

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livered to him as aforesaid, to deliver the same for the use of such library. And if any publisher, or the warehouse-keeper of the said Company of Stationers, shall not observe the directions of this act herein, then he and they so making default in not delivering or receiving the said eleven printed copies as aforesaid, shall forfeit, besides the value of the said printed copies, the sum of 5*l.* for each copy not so delivered or received, together with the full costs of suit; the same to be recovered by the person or persons, or body politic or corporate, proprietors or managers of the library for the use whereof such copy or copies ought to have been delivered or received; for which penalties and value such person or persons, body politic or corporate, is or are hereby authorised to sue by action of debt, or other proper action in any court of record in the United Kingdom."

Section 5. "And in order to ascertain what books shall be from time to time published, be it enacted, that the publisher or publishers of any and every book demandable under this act, which shall be published at any time after the passing of this act, shall within one calendar month after the day on which any such book or books respectively shall be first sold, published, advertised, or offered for sale within the bills of mortality; or within three calendar months, if the said book shall be sold, published, or advertised in any other part of the United Kingdom, enter the title to the copy of every such book, and the name or names and place of abode of the publisher or publishers thereof, in the register-book of the Company of Stationers in *London*, in such manner as hath been usual with respect to books, the title whereof hath heretofore been entered in such register-book, and deliver one copy on the best paper as aforesaid for the use of the *British Museum*; which register-book shall at all times be kept at the hall of the said

said company; for every of which several entries the sum of 2s. shall be paid, and no more; which said register-book may, at all seasonable and convenient times be resorted to and inspected by any person; for which inspection the sum of 1s. shall be paid to the warehouse-keeper of the said Company of Stationers; and such warehouse-keeper shall, when and as often as thereto required, give a certificate under his hand of every or any such entry; and for every such certificate the sum of 1s. shall be paid; and in case such entry of the title of any such book or books shall not be duly made by the publisher or publishers of any such book or books within the said calendar month, or three months, as the case may be, then the publisher or publishers of such book or books shall forfeit the sum of 5*l.*, together with eleven times the price at which such book shall be sold or advertised, to be recovered, together with full costs of suit, by the person or persons, body politic or corporate, authorized to sue, and who shall first sue for the same, in any court of record in the United Kingdom, by action of debt, bill, plaint, or information, in which no wager of law, essoign, privilege, or protection, nor more than one imparlance shall be allowed: provided always, that in case of magazines, reviews, or other periodical publications, it shall be sufficient to make such entry in the register-book of the said company, within one month next after the publication of the first number or volume of such magazine, review, or other periodical publication: provided always, that no failure in making any such entry shall in any manner affect any copyright, but shall only subject the person making default to the penalty aforesaid under this act."

At the trial of the cause before *Bayley J.*, *Gulldhall* sittings after *Michaelmas* term 1826, it appeared that the publication in question was part of a considerable work prepared by the late *Dr. Sibthorpe*, and directed

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by his will to be printed; that funds to a certain extent were by the same will given to carry on the undertaking; that it was carried on wholly by the executors; that three of the numbers were published before the passing of 54 G. 3.; that the Defendants had been the publishers since that time; that the number for which this action was brought, No. 9., was only a part of a volume, viz. the first part of the fifth volume.

Many more facts were proved, but the judgment of the Court turned solely on the above.

The learned Judge declared it to the jury to be his opinion that the Defendants were publishers within the meaning of the act, but that the number 9. was not a book demandable under the act. Whereupon the jury found for the Defendants.

The counsel for the Plaintiff then tendered a bill of exceptions, which now came on to be argued in the Court of Error.

Patteson for the Plaintiffs, contended that this was a book demandable under 54 G. 3. c. 156., because by that statute it was proposed to secure to the public libraries all books deliverable to them under 8 *Ann.* c. 19., 15 G. 3. c. 53., and 41 G. 3. c. 107., and this would have been a book deliverable under those acts. By the 8th *Ann.*, nine copies of every book, without exception, published with a view to sale, were to be delivered to the Company of Stationers, for the use of the royal library and eight others, and the British Museum was now substituted for the royal library. That act conferred on authors and their assigns, upon entering their works at Stationers' Hall, a copyright for fourteen years, and it was no doubt intended that all who could claim the benefit of copyright, should incur the burthen of supplying the privileged libraries. In order to effect that, it was necessary that the power of enforcing

enforcing penalties for not making entries of works at Stationers' Hall should be co-extensive with the power of claiming copyright. It was, therefore, that the entry which was only optional under the former acts, was made compulsory under the 54 G. 3. c. 156. But the public were by such entry to be protected against an undue extension of the claim to copyright, as well as authors against piracy; and when the parts of a work were, like the present, published at intervals of several years, how was the duration of the copyright to be estimated except by an entry of each part at the time of publication. A certain time also was limited for the suing for penalties, and if the parts of the work were published, as this was, at intervals, longer than the time allowed for suing, the act would be rendered altogether nugatory. If the entry could not be compelled, and the part be demandable according to the language of the act, at the time of publication, when would it be demandable? With regard to periodical works published at regular intervals, the act had provided that an entry of the title of the first number should be sufficient, because upon that entry the libraries would know when to demand the succeeding numbers; but from the act specifying periodicals of that class, such as magazines, reviews, and the like, it might be inferred, that when the times of appearance were irregular, an entry was required of every part. Where books consisting of more than one volume were published at different times, an entry was required of the title-page of each separate volume; which could have been enacted with no other object than that of giving notice to the public libraries; and in that respect no distinction could be made between a volume and a part of a volume published separately. If the Court held otherwise, the library, after obtaining one volume of a work, might be deprived of the residue by the protracted pub-

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publication of separate parts. The provision, that the entry shall be made when a work is first published and sold, shews that the legislature meant to include parts of a work, if published and sold separately, otherwise the act might be eluded altogether, by publishing every work in parts. Every number of a periodical work was demundable, and no distinction could be made between a work coming out in numbers and a work coming out in parts.

Platt for the Defendants, after protesting that this was not a work which the legislature intended should be entered at Stationers' Hall,—the expences having so far exceeded the amount which could ever have been obtained by the price attached to it as to preclude the idea that it was printed for profitable sale, and the number of copies printed shewing, that it was destined only for a circle of private subscribers, though two or three copies might have been sold,—argued, that the clause of the statute on which the Plaintiffs proceeded being so highly penal, must be construed strictly, and relied on the circumstance, that the word *part* was not to be found in the clause, nor even the word *volume*, which was found in s. 2. The Court would not extend to the non-entry of a *part*, a penalty attached to the non-entry of an entire *book*, or even of a *volume*, or of the first *number* of a work. Entry was required of the title-page: a *part* might consist only of a single sheet, and might have no title-page.

Cur. adv. vult.

ALEXANDER C. B. This is an action of debt brought by the *British Museum* against the Defendant in error for penalties given by the statute of the 54 G. 3 c. 156. s. 6.

This is an action of debt brought by the British Museum against the Defendant in error for penalties given by the statute of the 54 G. 3 c. 156. s. 6.

11

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This act, which is for the encouragement of learning, and respects literary property, by the fifth section requires that the publisher of every book demandable by force of it, shall enter the title of such book, with the name and residence of the publisher at Stationers' Hall, and endeavours to enforce obedience to this requisition, by imposing, for the neglect of it, upon the publisher, a penalty of 5*l.*, with eleven times the price of the book.

The action is brought for the recovery of these penalties. The first count of the declaration avers, that the Defendants were, on the 10th of *January* 1825, the publishers of, and did then publish a certain book entitled *Flora Græca*. Then follows a long title, immaterial to be stated. It avers the book to have been first published at the time mentioned, at the price of 12*l.* 12*s.* The count then avers it to be a book demandable by the act of the 54 G. 3. It then charges the Defendants with neglecting to enter the title to the copy of the book, and their names, as publishers, at Stationers' Hall. There are many other counts, but as the opinion of the Court does not turn upon the form of the pleadings, the differences are not material to be stated. The Defendants pleaded the general issue. Upon the trial there was a verdict for the Defendants. The Plaintiffs tendered to the Judge a bill of exceptions.

The result of the evidence, as it appears from the bill of exceptions, is, that the publication in question is part of a considerable work prepared by Doctor *Sibthorpe*, and directed by his will to be printed; that funds to a certain extent were, by the same will, given to carry on the undertaking; that some of the numbers were published before the act in question, that is, before *July* 1814; that the Defendants have of late years been the publishers; that the number which is the foundation of this action is called No. 9., being the first part of the fifth volume; that is, only a part of a volume.



In the view which this Court takes of the question which has been argued, these are the material facts. The Judge, Mr. Justice Bayley, stated to the jury his opinion to be, that the Defendants were publishers within the true intent and meaning of the act of the No. called No. 9, but that this No. 9. was not a book demandable by force of the 54 G. 3.; and that the evidence produced by the Defendants was sufficient to bar the action. This opinion is what the bill of exceptions objects to. It avers No. 9. to be a book demandable by virtue of the act in question, and that is the point we are to decide upon the present occasion.

This confessedly is not a book, nor even a volume; and whether a part of a volume be a book demandable under the act, depends upon the second section of the act. This section, so far as it is necessary to state it, is, in these words; (See ante, p. 541.) By this provision, the thing required to be delivered on demand, is the whole of every book and of every volume thereof.

The non-feasance of this is made penal.

This Court is of opinion with the learned Judge who tried the cause, that the persons for whose benefit this provision was intended, have no right by force, of a provision so expressed to demand from the publishers that which is neither a book nor a volume, but only a part of a volume. We are of opinion, that we are to understand the legislature to have in this clause employed the words in their common and accepted sense, and that we have no right by a questionable subtilty to extend the construction of the words beyond their usual and natural import.

No inference favourable to the Plaintiffs, as it appears to us, can be collected from the fifth clause, on which this action is immediately founded, and which requires the entry. So far, as it respects publications of this kind, it is more general: it speaks only of book or books.

It

It seems to me, when the two clauses are combined, to shew that a volume is called a book, but not a *fasciculus* a volume. We are, as I understand, all clearly of opinion that this is not a periodical publication within the proviso which respects works of that description.

The previous acts, the 8th of *Anne*, the 15th and 41st of his late Majesty, have been referred to as illustrating the clauses in question, and tending to sustain the view taken by the Plaintiffs of this case.

Those acts have been looked into, and do not appear in any manner to warrant the construction contended for.

It has been asked, if this *fasciculus* is not demandable, nor required under a penalty to be entered,—has the author any copyright in it? I answer, that it is a different question, and whichever way it be answered, would not rule the present question.

It has been asked, if not now, will this *fasciculus* ever be demandable? I answer again, these questions are properly left to be decided when they occur, but that, be that as it may, this No. 9., part of the fifth volume, was not demandable, nor required upon the true construction of the statute to be entered at the time of this action brought.

We are all of opinion that there should be
Judgment for the Defendants.

REGULA GENERALIS.

WHEREAS great expence is often unnecessarily incurred in making up demurrer books, from setting forth those parts of the pleadings to which the demurrers

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The British
Museum
Payne.

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fers do not apply: It is THEREFORE ORDERED, that from and after the end of this present *Hilary* term, when there shall be a demurrer to part only of the declaration, or other or subsequent pleadings, those parts only of the pleadings to which such demurrer relates shall be copied into the demurrer books; and, if any other parts shall be copied therein, the prothonotary shall not allow the costs thereof on taxation, either as between party and party, or attorney and client.

J. A. PARK.

J. BURROUGH,

S. GASELLE,

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Ninth Year of the Reign of GEORGE IV.

COLLINS v. WILSON.

April 24.

DEBT on the building act 14 G. 3. c. 78. to recover
a moiety of the expence of building a party-wall.

At the trial before *Best C. J.*, *Middlesex* sittings after
Trinity term, it appeared that the Plaintiff's house had
been built in 1819.

The house in respect of which the Plaintiff sought to
pay Defendant a rent of *20l.* a year. *G.* then employed Defendant to build the
houses.

Held, that Defendant was liable to contribute to a party-wall to which the houses
were attached.

Held, also, that the owner of the party-wall was not confined to ten days to give
his notice, but, there being no adjoining house when it was built, might give the
notice in reasonable time after the adjoining houses were attached.

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P p

charge

Defendant,
who had a
lease of land
from *N.*, en-
tered into an
agreement
with *G.*, who
was to build
houses, and

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v.
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charge the Defendant was attached to the Plaintiff's house, and his party-wall cut into, between *July* and the end of *September* 1820, the roof of the house attached being up at the latter period.

On the 30th of *September* 1820, the Defendant, who at that time held a lease of the ground on which stood the house so attached, assigned his property in it to one *Goodwin*, by a deed which recited that the Defendant held the ground under a lease from the Marquis of *Northampton*, bearing date *March* 25, 1820, and that he had agreed to let it to one *Guppy* for 20*L.* a year.

This agreement with *Guppy* had been made before the house attached to the Plaintiff's was built, and *Guppy* had thereupon employed the Defendant, a builder, to erect it. In 1822, the Plaintiff had asked *Guppy* and another person to contribute to the expences of the party-wall, and the present action was not commenced till 1826. No notice under the statute had been given to the Defendant till *June* in that year, the Plaintiff having experienced great difficulty in ascertaining what was the nature of the transactions between *Guppy* and the Defendant, each alleging that the other was the owner of the improved rent at the time when the liability accrued.

For the Defendant it was objected, that *Guppy* was the person liable, and that under the Building Act, s. 41., the notice ought to have been given within ten days after the party-wall was built. (a)

The

(a) By 14 G. 3. c. 78. ss. 41, 42. it is enacted, "That the person or persons at whose expence any party-wall or party-arch shall be built, agreeably to the directions of this act, shall be reimbursed by the owner or owners, who shall be entitled to the improved rent of the adjoining building or ground, and who shall at any time make use of such party-wall or party-arch, a part of the expence of building the same, in proportion after mentioned; and such moiety or other proportional part of the expence of building such party-wall or party-arch, shall be so paid to the person or persons at whose expence the same shall be built, or in whom the property thereof shall be vested,

at

The learned Chief Justice thought that the Defendant was the owner of the improved rent within the meaning of the statute, and that there was no one to whom notice could have been given within the ten days.

A verdict having been found for the Plaintiff,

Wilde Serjt. obtained a rule *nisi* for a new trial on the foregoing objections.

Spankie and *Storks Serjts.* shewed cause. By s. 41. the person who is entitled to the improved rent when the party-wall is first cut into and used, is liable to contribute to the expence; it is not necessary he should be in possession of such a rent; it is sufficient if he be in a situation to claim it, supposing it to exist: *Sangster v. Birkhead.* (a) At the time the Plaintiff's wall was cut into the Defendant was the only person who could claim such a rent, and was in fact entitled to it under the agreement with *Guppy*.

With respect to the notice, where there is no adjoining house at the time the party-wall is built, there is no person to whom notice can be given. Under those circumstances it must be given as soon as it conveniently can: *Reading v. Barnard.* (b) None of the reported cases relate to maiden walls, but to walls between two

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at the times hereinafter mentioned; that is to say, in respect of every such party-wall to any house or building whereunto, at the time of building the same, no other house or building was adjoining, so soon as such party-wall shall be first cut into or made use of; and in respect of every such party-wall or party-arch as shall be built against or adjoining to any other house or building, so soon as such party-wall or party-arch shall be completely

built and finished; and that within ten days after such party-wall or party-arch shall be so built, or as soon after as conveniently may be, such first builder or builders shall leave at such adjoining house or building a true account in writing of the number of rods in such party-wall or party-arch, for which the owner or owners of such adjoining building or ground shall be liable."

(a) 1 B. & P. 303.

(b) 1 Moody & Malk. 71.

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WILSON.

houses already built: *Beardmore v. Fox* (a), *Southall v. Ledbetter* (b), *Peck v. Wood*. (c)

Wilde contra. The Defendant having parted with his interest to *Guppy*, and having been employed by *Guppy* to build, instead of building on his own account, was not liable to be charged at the time the Plaintiff's wall was first cut into and used. Though *Guppy* took only an equitable interest under the agreement, he was as liable to be charged as if he had the legal interest; *per Gibbs C. J.* in *Taylor v. Reed*. (d) Then the notice ought, according to the act, to have been given at least within a reasonable time after the adjoining house was built; and whatever difficulties there might be as to the person to be served, at all events it might have been done before 1826.

The only question left to the jury was, when did the building commence; whereas they ought to have been directed to ascertain who was the owner of the improved rent when the building commenced.

BEST C. J. At the trial I entertained some doubt, because the act is so obscure that no lawyer has been able to understand it; I therefore gave the Defendant leave to move; but upon examining the dates, the case is now sufficiently clear.

The Plaintiff built his house in 1819, there being then no house on the spot which the Defendant subsequently took, and no person therefore to whom the Plaintiff could within ten days give the notice required by the act.

On the 25th of *March* 1820, the Marquis of *Northampton* granted a lease of the adjoining ground to the Defendant; and in an assignment which was

(a) 8 T. R. 214.

(b) 3 T. R. 458.

(c) 5 T. R. 130.

(d) 6 Taunt. 249.

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made by the Defendant to *Goodwin* on the 30th of *September* in that year, it was recited that the Defendant had in *July* agreed to let to *Guppy*, at a rent of 20*l.* a-year, the two houses adjoining the Plaintiff's. In *July* therefore he was entitled to this rent, and continued so till the 30th of *September*, when he assigned to *Goodwin*, and though the evidence was somewhat contradictory as to the time when the house was begun, it was agreed on all hands that it was covered in by the end of *September*. The Defendant, therefore, must have been entitled to the improved rent at the time the claim in respect of the party-wall attached, for he had then secured to himself 20*l.* a-year from *Guppy*. This case, therefore, differs from those in which the owner of the improved rent has not been ascertained, though upon one occasion it was said to be sufficient if the party charged had asked money for his lease. In *Stewart v. Smith (a)*, Gibbs C. J. said, "I am by no means clear that if it had been a proceeding under the act the Defendant would not have been liable, for it appeared that he had asked 300*l.* for his lease; and it has been decided that where a tenant has a beneficial lease, the value of which has been considerably improved, he is to be considered as the owner of the improved rent, and therefore liable."

It is difficult, indeed, to collect the meaning of the statute, but it seems to be, that the mere occupier or owner of the land shall not be called on to contribute, but when it becomes covered with houses from which he will derive an improved rent, he is liable to be charged, and that, as soon as the party-wall is cut into; not when he may be actually in the receipt of the rent; for he is immediately benefited by using the wall, and it may be long before his houses are completed or the rent re-

(a) 2 *Marsh.* 436.

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ceived. The Defendant, therefore, who could not have reserved the rent from *Guppy* unless he had made use of the Plaintiff's party-wall, is the party who ought to contribute to the expence of it.

The next objection is, that notice was not given in time. If the Defendant's house had been built at the time the Plaintiff's party-wall was raised, I should have thought the notice within ten days, a condition precedent to his recovering in respect of it. But the act, no doubt with reference to houses to be subsequently built, prescribes that the notice shall be given in ten days, or *so soon as convenient*; and it must be in the discretion of the Judge to say whether it was given as soon as convenient under the circumstances of such cases.

I think it was given as soon as convenient here, for the Plaintiff had no means of ascertaining the relation that subsisted between *Guppy* and the Defendant, and they were trying for six years to trick him out of his claim. Where the adjoining house is already built, there is a place at which the notice may be left within the ten days; but when it is not, there are no means of complying with that part of the statute, and what shall be a convenient time for notice must fluctuate according to the circumstances of each case.

PARK J. I think this Defendant was the owner of the improved rent within the meaning of the act. Having a lease from the Marquis of *Northampton*, he enters into an equitable agreement with *Guppy*, from which he is to derive a rent of 20*l.* a-year; and his interest in this rent he does not part with till the 30th of *September*, when the house was covered in; so that the party-wall must have been used previously. The contribution in respect of that wall was demandable when the wall was cut into, which must have taken place before the Defendant's house was roofed. The ten days' notice required by the statute

statute does not apply to such a case as this, in which it is sufficient if the notice be given in reasonable time.

BURROUGH J. concurred.

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GASELEE J. The party-wall was cut into between *July* and *September*, and during that period the Defendant was entitled to the improved rent, which he had actually reserved from *Guppy*; so that there is no necessity for discussing the minor point as to the liability where a party has a mere claim for such a rent, or where the value of the property, merely, is improved, as in *Lambe v. Hemans*. (a) I felt some difficulty at first about the ten days' notice; but I do not think it applies to a wall of this kind, where there was at first no adjoining building.

Rule discharged.

(a) 2 B. & A. 467.

DOE dem. CALVERT v. FROWD.

April 25.

THIS was an ejectment to recover possession of a house in *Serle Street, Lincoln's Inn Fields*, and tried at the *Middlesex* sittings after *Trinity* term 1827, before *Best* C. J., when a verdict was found for the lessor of Defendant, who held under a tenant for life, received, on her death, a letter from the lessor of the Plaintiff, claiming as heir, and demanding rent.

Defendant answered, that he held the premises as tenant to *S.*; that he had never considered lessor of Plaintiff as his landlord; that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that without disputing the lessor of the Plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof, in a legal manner;

Held, that this was a disclaimer of lessor of Plaintiff's title.

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 v.
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the plaintiff, who claimed title to the premises in question as heir-at-law of *Mary Whitall*, deceased.

Mary Whitall was seised in fee of the premises, and died so seised in the year 1800, devising the premises for life to *Margaret Hodgson*, who afterwards married *George Smallpiece*, and received the rent during her life.

M. Hodgson died in 1826.

The lessor of the Plaintiff claimed to be entitled to the premises as heir-at-law of *Mary Whitall*, on the decease of *Margaret Hodgson*, the tenant for life.

At the trial, the lessor of the Plaintiff having proved that he was heir-at-law to *Mary Whitall*, and her seisin,

The following letters between the lessor of the Plaintiff's attorney and the Defendant were put in: —

Edward Frowd, Esq.

Sir, — In order that you may be fully informed of the right and title of my client, *Mr. John Calvert*, to the premises in No. 14. *Serle Street*, in your occupation, and late the property of *Mrs. Margaret Smallpiece, Kensington*, deceased, I send you the particulars enclosed, (these were a copy of the lessor of the Plaintiff's pedigree, and a statement of his claim to the premises,) which I trust will fully satisfy you of his title, and that there will be no difficulty or objection to his receiving the rent, which will be due the 25th instant. I shall readily give you any further information or satisfaction which you may require, if you will make an appointment to call on me for that purpose.

Yours, &c.

17th March, 1826.

J. MANGNALL.

Sir, — In answer to your letter respecting *Mr. John Calvert's* claim to the house which I hold as tenant to *Mr. Smallpiece* in right of his wife, I beg to inform you, I have not hitherto considered *Mr. John Calvert* as the landlord of the house in *Serle Street*, nor can I pay any
 rent

rent to him without the risk of being hereafter called upon to pay it over again to the person who may fancy and perhaps prove he has a better title. I shall be at all times ready to pay the arrears to any person who shall be proved to be either heir at law or otherwise entitled to receive it; and without wishing to dispute the connection of blood of Mr. *John Calvert* to Mrs. *Mary Whitall*, deceased, I must decline taking upon myself to decide upon that claim without more satisfactory proof in a legal manner.

I am, &c.

4th Nov. 1826.

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On this evidence the jury, under the direction of the Lord Chief Justice, who thought the Defendant's letter amounted to a disclaimer, found a verdict for the Plaintiff.

A rule *nisi* for a nonsuit was obtained on the ground, that the lessor of the Plaintiff had treated the Defendant as his tenant, and that, therefore, he ought to have had notice to quit.

Bosanquet and *Storks* Serjts. shewed cause. The Defendant's letter amounts to an express disclaimer of the title of the lessor of the Plaintiff, and if it be such, it is clear that notice to quit is not necessary.

Wilde Serjt. *contra*. The letter contains no disclaimer, but merely cautious apprehension, and a request for further information upon a matter at that time doubtful. In *Doe dem. Williams v. Pasquali* (a), it was held that a mere refusal to pay rent to a devisee under a contested will, accompanied with a declaration that the tenant was ready to pay to any person entitled, did not amount to

(a) *Peake*, N. P. C. 196.

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a disclaimer; and here there was no demand of possession by the lessor of the Plaintiff, so that the Defendant, being in lawfully, could not be a trespasser till the lessor of the Plaintiff dissented to his possession.

BEST C. J. Mrs. *Smallpiece*, the lessor of the Defendant, had only a life interest in the premises: her husband had no estate by the curtesy; the moment she was dead, therefore, the lessor of the Plaintiff might treat the Defendant as a trespasser. If, indeed, the Defendant had ever paid rent to the lessor of the Plaintiff, a new term would have been created; but this was not the case, and when the lessor of the Plaintiff demands his rent, the Defendant says, "I will not pay, I am tenant to *Smallpiece*;" and at the trial puts the lessor of the Plaintiff to prove his title. If this be not disclaimer, what is? But I should not have thought differently even if this case had been exactly like the case of *Doe dem. Williams v. Pasquali*, because a notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no necessity for a notice to end that which he says has no existence.

PARK J. There never was any relation of landlord and tenant between these parties; rent was demanded and refused, and the lessor of the Plaintiff could not make the Defendant tenant against his consent. The offer of the lessor of the Plaintiff was only *sub modo*, and not accepted.

GASELEE J. If the Defendant had held under the ancestor of the lessor of the Plaintiff, the question agitated in *Doe dem. Williams v. Pasquali* might have arisen, but all his interest expired on the death of Mrs. *Smallpiece*.

Rule discharged.

1828.

BENTON v. BULLARD.

April 25.

ACTION on an attorney's bill. *Jones*, Serjt., moved for a rule *nisi* to allow the Defendant his costs of taxing the Plaintiff's bill of costs, more than a sixth having been taken off on taxation. The prothonotary had refused to allow these costs, on the ground that the Plaintiff had commenced his action on his bill before the Defendant had obtained the order to tax it; and said that he had pursued the uniform course on such occasions.

Costs of taxing an attorney's bill not allowed to a party who succeeds in striking off a sixth, where the order for taxing is not obtained till after the action on the bill has been commenced.

Jones contended that the case fell within the intention of the statute, which allowed costs to the party who succeeded in striking off a sixth on taxation. But

The Court said, that the practice was the law in such cases, and that the point had been determined repeatedly.

Rule refused.

SEELEY v. MAYHEW.

April 25.

ASSUMPSIT against the Defendant, as acceptor of a bill of exchange, drawn by *T. Parish*, and indorsed through *R. Oddy* to the Plaintiff. At the trial, *London* sittings after *Hilary* term last, before *Bur-*

The Court will not grant a new trial on the ground that witnesses, by whose testimony the verdict was obtained, have been indicted for perjury in the cause.

rough

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v.

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rough J., the Defendant's hand-writing having been proved, the defence was that the bill had been given for a horse sold by *Seeley* to *Parish*, which was warranted sound, but was ill at the time, and shortly afterwards died.

There was conflicting evidence as to the warranty, and as to who was the seller of the horse.

The jury having found a verdict for the Defendant,

Adams Serjt. now moved for a new trial on the ground of surprise, the defence not having been anticipated, and true bills for perjury having since been found against the witnesses who spoke to the warranty, and the property of the horse being in *Seeley*. But

The Court thought that was a circumstance of which they ought not to take notice, and observing that Lord *Mansfield* and Lord *Erskine* had expressed the greatest disapprobation of indicting witnesses while a cause was yet pending, refused the rule. *Adams*, therefore, Took nothing. (a)

(a) See *Tburtell v. Beaumont*, 1 Bingh. 339.

April 25.

ROBINSON v. HOFMAN.

One joint-tenant may without the assent of his fellows, appoint a bailiff to distrain for rent due to all the joint-tenants.

REPLEVIN. Cognizances by Defendant; first, as bailiff of *Henry Marchant*, the elder, *Samuel Cullum*, and *Stephen Cullum*, for 35*l.*, one quarter's rent in arrear to them, in respect of a house held by the Plaintiff, under a demise, at 140*l.* a year, payable quarterly.

Second,

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Second, As bailiff of *H. Marchant*, the elder, for one undivided moiety, and two undivided fifth parts of the other moiety of 35*l.*, one quarter's rent in arrear to him, in respect of one undivided moiety, and two undivided fifth parts of the other moiety of a house held by the Plaintiff, under a demise, at 140*l.* a year, payable quarterly.

Third, As bailiff of *H. Marchant*, the younger, for one undivided moiety, and one undivided fifth part of the other moiety of 35*l.*, one quarter's rent in arrear to him, in respect of one undivided moiety, and one undivided fifth part of the other moiety of a house held by the Plaintiff, under a demise, at 140*l.* a year, payable quarterly.

To each of these cognizances the Plaintiff pleaded *non tenuit*; *riens in arriere*; and that Defendant was not bailiff.

At the trial before *Best C. J.*, *Middlesex* sittings, after *Trinity* term last, it appeared that the Plaintiff held the premises under a lease executed by *Henry Marchant*, the elder, *Samuel Cullum*, and *Stephen Cullum*, described as surviving trustees under the will of *John Cullum*; that the warrant of distress was signed by *Henry Marchant*, the elder, alone, and authorized a seizure for 24*l.* 10*s.* only; and that *Samuel Cullum* being applied to, to authorise the distress, declined to do so, or to adopt it afterwards.

A verdict was thereupon taken for the Plaintiff, with leave for the Defendant to move to set aside, and enter a verdict for the Defendant instead; accordingly,

Storks Serjt. having obtained a rule *nisi* to that effect, on the ground that one joint-tenant may distrain, and that if he does so, he is compelled to avow, pursuant to the terms of the lease by which the premises are held;

Wilde

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Wilde Serjt. now shewed cause. Admitting that one joint-tenant may distrain alone, avowing for himself, and making cognizance as bailiff of the others, (*Leigh v. Shepherd* (a), *Pullen v. Palmer* (b),) he cannot depute a bailiff for them, or distrain after their express dissent. One who has only an authority by law, cannot delegate it to another. *Year Book*, 7 H. 4. 34. pl. 1. If so, the first cognizance cannot be supported, for the Defendant was not the bailiff of the three lessors, but of *Marchant*, the elder, only, *Cullum* having expressly refused to give his authority to the distress; and though the cases lay it down that a joint-tenant may distrain alone, none of them have gone the length of saying that he may do so in spite of the dissent of his fellows; neither will a warrant for 24*l.* 10*s.* support a cognizance for 35*l.*; and the second and third cognizances having no application to the lease given in evidence may be put of the question.

Storks. If, as it is admitted, one joint-tenant may, without the assent of his fellows, distrain for rent, avowing in his own name, and making cognizance as bailiff to them, it seems to follow that he may distrain by a bailiff, for it must be immaterial whether he makes the distress by his own hand, or the hand of another; and in *Leigh v. Shepherd*, *Dallas C. J.* cites the *Year Book*, 15 H. 7. 17 *a.*, to shew that if a party has an interest to entitle him to distrain, the appointment of the bailiff is not traversable. The inconvenience would be great if a joint-tenant could not distrain, even in spite of the dissent of a co-tenant; for it would in such case be in the power of one of many, to deprive all the others of their rent. But, though there was no assent in this case, neither was there any dissent. With regard to the supposed variance between the sum mentioned in

(a) 2 B. & B. 465.

(b) 5 Mod. 72.

the warrant, and that justified in the cognizance, it is immaterial, since a party may distrain for one cause, and avow for another.

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BEST C. J. I had considered at first that there was an express dissent by *Cullum* to this distress; I cannot now collect that such was the case, and it is, therefore, unnecessary to decide what would have been the effect of such a dissent.

Cullum said he declined authorizing this distress: this does not amount to a dissent; and he, consequently, left his co-tenant in the same situation as the co-tenant stood in *Leigh v. Shepherd*; to the decision in which case I entirely subscribe. The rule, therefore, must be made absolute.

PARK J. I am of the same opinion, and agree with the decision in *Leigh v. Shepherd*. That is an authority to shew that the assent of the co-tenant is not necessary, and there has been no express dissent here.

BURROUGH J. One joint-tenant may recover the whole rent, and give a discharge for it; he may, therefore, distrain, and he must avow according to the title. There is no colour for saying that there was any dissent here.

GASELEE J. If the distress had been made by *Marchant*, there could have been no doubt; but if *Marchant* has authority to distrain for himself and others, it comes to the same thing whether he distrains by himself or by a bailiff.

Rule absolute.

1828.

April 26.

ANDREWS v. DALLY.

Where the expenses of passing an act of parliament are directed by the act to be defrayed out of certain tolls to be levied under the act, it is incumbent on the party who sues for the expense of soliciting the act, to shew that tolls have been collected sufficient to cover his demand.

THE Plaintiff sought in this action to recover a bill of costs for soliciting an act of parliament, entitled an act to alter and amend an act passed in the third year of G. 4. c. 57. for establishing a market and mending roads at *Bognor*. The action was brought, pursuant to the directions of the second act, against the Defendant as clerk of the commissioners appointed for the purposes of the act, by which it was enacted that the expences of the act should be paid out of the monies then raised or levied under the first act, or out of the monies that should be raised by virtue of the second.

By the first it was enacted, s. 6., that no act of the commissioners should be valid unless done at a general or special meeting at which three commissioners should be present; and by s. 25. that the tolls and duties to be levied under the act should first be applied in discharging the costs and expences incurred in passing the act.

At the trial before *Burrough J.* no evidence was offered of any money having been raised under either of the acts, and it was objected that the Plaintiff ought to have shewn a retainer authorized by a meeting at which three commissioners were present. Having failed to do this, he was nonsuited.

Merewether Serjt. now moved to set aside this nonsuit, on the ground that as the act contained a specific direction for the payment of the expences incurred in passing it, there was no necessity for shewing such a retainer.

tainer. That direction was of itself an acknowledgment that the expences had been incurred upon proper authority. But, without entering on this point,

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The Court were clear that as the expences were to be paid out of the tolls, and the commissioners were not personally responsible, the Plaintiff could not recover unless he shewed that a sum had been raised by tolls sufficient at least to pay the whole of his demand.

Rule discharged.

MURPHY and Another v. BELL.

April 28.

ASSUMPSIT on a policy of insurance. The declaration alleged that the Plaintiffs by the names and description *J. and E. Murphy*, or as agents, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance and cause themselves and them and every of them to be insured, lost or not lost, at and from *London to Cork*, including the risk in craft to and from the vessel, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the *Zephyr*. The said ship, &c., goods and merchandizes, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy were and should be valued at five tierces coffee, valued at 27*l. per tierce*, say 135*l.*; that policy to be deemed sufficient proof of interest."

A policy of insurance stipulated, "that the goods insured were and should be valued at five tierces coffee, valued at 27*l. per tierce*, say 135*l.*; that policy to be deemed sufficient proof of interest."

Held, that the policy was void under 19 G. 2. c. 37.

At the trial before *Best C. J.* *London* sittings after *Easter* term 1827, a verdict having been found for the

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Plaintiff in respect of a loss within the terms of the policy,

Wilde Serjt. in *Trinity* term last obtained a rule *nisi* to arrest the judgment, on the ground that the policy described in the declaration was void, the statute 19 G.2. c. 37. s. 1. having enacted that no assurance shall be made on any ship or on any goods to be taken on board of such ship, "interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer."

Taddy Serjt. this term shewed cause. In order to render the policy invalid, it ought to fall either within the spirit or the letter of the statute. But it is clearly not within the spirit of the statute, which was passed solely to prevent gambling by means of wagering policies, where the party insuring has no interest to insure. That the Plaintiff had goods on board sufficiently appears from the stipulation that they should be valued at five tierces coffee; and the clause, "that policy to be deemed sufficient proof of interest," following immediately after the clause of valuation, must be taken to mean that the policy should be proof of the amount of interest. It contains nothing to preclude proof of the existence of interest, and is in effect no other than a valued policy. In *Grant v. Parkinson* (a), where it was agreed that in case of loss the profits insured should be valued at 1000*l.*, "without any other voucher than the policy," Lord *Mansfield* said, "I cannot distinguish it from a valued policy; there is no pretence for saying it is a wagering one." And in *Da Costa v. Firth* (b), where it was agreed that the goods should be valued at the sum insured on the packet-boat, "without further proof of interest than the policy," it was

(a) *Park on Ins.* 302.(b) 4 *Burr.* 1966.

holden to be an exception out of the statute of 19 G. 2. c. 37., and that a loss having happened, the insured was entitled to recover. If the present policy be not within the spirit of the statute, it cannot be impugned unless it fall within the very words: but the words of the statute only avoid policies made "without further proof of interest than the policy," whereas the language of the policy in question is, that it shall be "deemed sufficient proof of interest."

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Wilde. The object of the statute was to prevent insurances in which the policy was to be proof, not of the amount, but of the existence of interest, and the form pursued is immaterial, provided that be the intention of the parties. The policy in *Grant v. Parkinson* was truly a valued policy, intended to be a proof, not of the existence of an interest in the thing insured, but of the amount of its value; and *Da Costa v. Firth* was decided on the ground that the policy fell within an exception in the statute touching effects from any port in the possession of the crowns of *Spain* or *Portugal*. The policy in question clearly dispenses with any proof of interest except the production of the policy.

Cur. adv. vult.

BEST C. J. In the argument of Plaintiff's counsel it has been assumed that the sole object of the 19 G. 2. was to prevent gaming under the pretence of insuring against the perils incident to navigation. On this assumption he has insisted that if it appears that a policy is not a gaming policy, and the precise words specified in the act are not used, the case is not within the statute. The preamble of the act shews that gaming was the least of the evils that the legislature proposed to remedy. Adventures on which gambling policies might be made but which were not likely to be undertaken for the other purposes which it was the object of the statute to prevent,

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are exempted from its operation. The preamble states that policies of insurance with clauses of interest or no interest, or such as in case of loss made the policies sufficient proof of interest, were used to protect persons who were carrying on illegal traffic, and were made the means of profiting by the wilful destruction and capture of ships. Privateers, which carried no cargoes, and the crews of which were composed of more persons than it was safe to trust with the secret that the ships were to be wilfully destroyed or purposely exposed to capture; ships going to the territories of *Spain* or *Portugal*, which were not likely to export wool (the exportation of which was in *George* the Second's reign the thing most dreaded by politicians), or any other raw materials; or to import any articles that could interfere with the monopoly of *British* manufacturers; are exempted from the operation of the act. This shews that gambling was not the only thing guarded against.

If a policy contains words to the same effect as those enumerated in the act, the case is within it, although it may be manifest that it is not a gaming insurance. The temptation to fraudulent insurances is very great; the object to be attained by them is often easily accomplished; and the consequences to that most valuable class of men, underwriters, and seamen, whose lives are often put in hazard owing to such insurances, are dreadful. The case of the *King v. Colling*, and *Easterby* and *M'Farlane* (a), in which I was counsel for two of the prisoners, and others that have been brought before the courts of justice, prove that such frauds are committed. We cannot too strongly inforce all the provisions of this statute. If we held that unless the words recited in the statute are introduced into policies, and they are not gaming policies, they are valid, we shall render inoperative its provisions against fraudulent in-

(a) 2 *Russell on Crimes*, 1738.

surances and such as encourage clandestine trade. The act does not say that policies containing certain specified words shall be void, but that "no insurance shall be made, interest or no interest, or without further proof of interest than the policy." The meaning of this clause is, that no insurance shall be effected by a policy so worded as to entitle the assured to recover against the underwriters a certain stipulated sum of money, whether he had any interest in the ship or cargo or not, or that binds the underwriter not to require any other proof of the assured's interest but the admission of such interest in the policy. Whatever words may be used, if that be the effect of the policy, no action can be maintained on it. This is the only construction that will restrain the practices intended by this act to be prevented, and which is according to the import of the words used by the legislature.

It was thought at one time that all valued policies were within the act, and when one considers that frauds by the loss of ships, may be accomplished by means of policies in which a higher value is put on articles insured than they are worth, there was reason for thinking so. But the case of *Lewis v. Rucker* (a) has determined that policies only covering the prime cost of the goods are valid. In the case of *Grant v. Parkinson*, the policy declared, "that in case of loss the profits should be valued at 1000%. without any other valuation than the policy." Lord *Mansfield* at first thought that policy was void. On further consideration his Lordship said, "it is incumbent on the Plaintiff to prove *some interest*: the meaning of the policy is not to evade the act of parliament, but to avoid the difficulty of going into an *exact* account of the quantum. I cannot distinguish it from a valued policy."

(a) 2 Burr. 1167.

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If a policy then dispenses with all proof of interest, it is within the act, and void. If the Plaintiff must prove his interest, and the policy only saves him the trouble of shewing its amount, it is a valued policy and good. Let us try the validity of the policy on which this action is brought by this test: "goods and merchandizes for so much as concerned the assured and assurers were and should be valued at 5 tierces coffee, valued at 27l. per tierce, say 135l. *That policy to be deemed sufficient proof of interest.*" This is a full admission of all the assured would be required to prove, as well, as to his having goods on board, as to the value of those goods. The words, "*should be valued at five tierces of coffee,*" admit that five tierces of coffee belonging to the Plaintiff were on board. That would dispense with the necessity of proving that any coffee belonging to the Plaintiff was on board. The words, *that policy to be deemed sufficient proof of interest*, are of precisely the same import as the words "without further proof of interest than the policy." As no inquiry is to be made whether the assured had any property in the ship insured or not, it is, in effect, an insurance *interest or no interest*. We are of opinion that the judgment must be arrested.

Judgment arrested accordingly.

April 29th

WADSWORTH v. GIBSON.

Bail in error not dispensed with where the error, though real, is only of form.

BAIL in error. Upon an affidavit that this cause commenced by a *capias* issued out of this Court into the county palatine of *Lancaster*, to which the Defendant appeared, and the Plaintiff declared in trespass, laying the venue in *Lancashire*, that the Defendant without

without pleading, suffered judgment by default; that a writ of enquiry had been issued, and final judgment signed; that it was the Defendant's intention to assign for error the want of an original writ; and that the writ of error had not been brought for delay,

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E. Lawes Serjt. moved for a rule *nisi* to dispense with bail in error, required by 6 G. 4. c. 96., which was passed to restrain writs of error for delay; and urged that bail ought not to be required, where, as in the present instance, there was manifest error on the record.

But the *Court* thought the error a mere objection of form, and *Lawes*

Took nothing.

DAVIES and Another, Assignees of How, a
Bankrupt, v. WILKINSON.

April 29.

ACTION to recover the amount of premiums received by the Defendant as broker, in respect of certain policies of insurance subscribed by the bankrupt.

At the trial before *Best C. J.*, *London* sittings after *Trinity* term last, the Defendant claimed a set-off to a greater amount in respect of a loss due from the bankrupt on his subscription to a policy effected by and in the name of the Defendant, at the request of *Thompson and Co. of Leeds*, on goods in which *Thompson and Co.* were interested, but on which the Defendant had a lien in respect of a debt due to him from *Thompson and Co. T.*, on goods in which *T.* was interested, but on which the Defendant had a lien to a greater amount than the set-off claimed.

Defendant, an insurance broker, being sued for premiums received by him on policies subscribed by the Plaintiff, was allowed to set off a loss on one of those policies effected in the name of the Defendant at the request of

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for premiums to a greater amount than the set-off claimed.

A verdict was found for the Plaintiff subject to the opinion of the Court, whether the Defendant could insist on this set-off, *Thompson* and Co. being interested in the goods insured, and having ordered the insurance to be effected.

Wilde Serjt. having accordingly obtained a rule nisi to set aside this verdict, on the ground that the Defendant might have sued the bankrupt in respect of the loss, the policy on which it arose having been effected in the Defendant's name; and that he was therefore entitled to set off a debt he might have recovered against the bankrupt by action;

Taddy and *E. Lawes* Serjts. shewed cause. The Defendant is not entitled to set off in respect of a loss, unless he has an interest on the specific goods insured, or has advanced money on them. In *Koster v. Eason* (a), indeed, it was holden that a broker might set off in an action for premiums, losses on policies effected in the name of his own firm; but that was a very narrow ground of decision, for it is well known that policies are usually effected, not for the person whose name may be found on them, but for all who may appear to be interested; however, the broker whose name was inserted in *Koster v. Eason*, acted on a *del credere* commission which put him in the condition of a principal; and that this circumstance was esteemed material, appears clearly from the language of *Le Blanc J.* in the subsequent case of *Parker v. Beasley*. (b) A mere title to hold the policy will not confer a right of set-off against the underwriter: *Goldsmith v. Lyon*. (c) *Minett*

(a) 2 M. & S. 112.

(b) 2 M. & S. 423.

(c) 4 Taunt. 534.

v. Forester (a) clearly shews that in an action for premiums, the broker cannot set off returns of premium against the underwriter's assignees unless they have made him their agent. The agency to the underwriter, in virtue of which the broker claims to set off against him, is rescinded by bankruptcy, and in order to set off against the assignees, an agency for them also ought to be shewn.

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Wilde, contra, was stopped by the Court.

BEST C. J. I think this case falls within the principle laid down in *Parker v. Beasley*. The facts are as follows:—The bankrupt subscribes a policy to the Defendant, upon which a loss has been incurred. The Defendant is indebted to the bankrupt for premiums. But though the Defendant's name was on the policy subscribed by the bankrupt, the goods insured belonged to *Thompson and Co.*; and it has been contended that the Defendant cannot set off the amount of the loss, because he is not interested in the goods. But he might have sued the bankrupt on the policy, and though the goods were not his, he had a lien on them, for *Thompson and Co.* were indebted to him for premiums beyond the value of the goods. In *Parker v. Beasley*, there was no *del credere* commission, but the broker had a lien on the goods insured, and the principle on which the decision turned, was, that the broker's name being on the policy, he had a right to sue the underwriter; and that where a party has a right to sue on the policy, and has a lien on the goods insured, he may set off in an action for premiums, the sum to be recovered for the loss. The present Defendant stands in the same situation; he had a right to sue on the policy subscribed by the bankrupt,

(a) 4 Taunt. 541.

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and a lien on the goods insured; and it would be strange to say that he might sue the bankrupt, and yet not set off the debt to be recovered in such suit. *Thompson* can never claim on the policy, because he must first discharge his debt to the Defendant, and he cannot do that without giving credit for the sum charged by the Defendant in respect of this loss. Lord *Mansfield* says, that the doctrine of set-off, as consisting with equity, ought to be carried as far as it can. *Minett v. Forester* does not touch the present case, because the material fact on which our decision rests, is not to be found there; it no where appearing that the policy, the loss on which it was proposed to set off, was effected in the name of the party who claimed the set off. But independantly of the decisions, looking at the statute of Geo. 2., — the right of the broker to sue on the policy subscribed by the bankrupt, — and his lien on the goods insured, — we think him clearly entitled to the set-off he claims.

PARK J. Whether on the justice of the case or on principle, this rule ought clearly to be made absolute. The cases have proceeded by degrees, and *Koster v. Eason*, and *Parker v. Beasley*, warrant the Court in the decision they now pronounce.

In *Koster v. Eason* the broker had a *del credere* commission, and the Court thought he was entitled to set off a loss on a policy effected in his own name. In *Parker v. Beasley* I took unsuccessfully the distinction which my brother *Taddy* has taken to-day, but the Court thought the principle the same whether the broker acted under a *del credere* commission or not.

In the present case there was no *del credere* commission, but the policy was effected in the name of the broker, who might have sued the underwriter upon it; he had a lien upon the goods insured, and the owner of
 them

them could not recover without allowing the broker credit for the amount. The same argument was raised in *Koster v. Eason*, but Lord *Ellenborough* said, "another answer to the claim as to the ten policies is this, that it does not appear that the house of *Eason* and Co. have paid their principals, though they have given them credit for these losses and returns; and if they have not paid them, the allowance of this claim may either interfere with the rights of such principals, or may leave *Swan's* estate exposed to a further claim from those principals. Suppose the house of *Eason* and Co. to become insolvent and unable to satisfy their guarantees, if the allowance of this set-off were to take away from the principals the right of claiming upon *Swan's* estate, it would be doing clear injustice to the principals, who ought to have the power of looking to *Swan* as their principal debtor, as well as to *Eason* and Co., the guarantees for his solvency; and if the allowance of this set-off were not to take away from the principals the right of claiming upon *Swan's* estate, it would be great injustice to *Swan's* estate, because in that case it would be liable to pay the principals a dividend, after having made *Eason* and Co. a payment to the extent of the whole demand." The case of *Parker v. Beasley* was that of brokers who had effected policies on goods in their own names, on account of their principal, and had accepted bills on account of the goods, so that they had only a lien to that extent, and yet the Court held it sufficient, and decided on the distinction which supports the principle on which we now determine. *Le Blanc J.* said, "the case of *Koster v. Eason* established this, that where the broker himself is a party to the contract, so as to enable him to maintain an action in his own name, if he has acquired an interest by a *del credere* commission, he is entitled to a set-off. It is the same thing if he acquires an interest by advancing on the credit of
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the consignment." The Defendant here has an interest by lien, and a right to sue on the policy.

BURROUGH and GASELEE Js. concurring, the rule was made

Absolute.

May 21

MACBEATH v. ELLIS and Two Others.

Where a party is detained in custody for a judgment-debt, the attorney who was concerned in the cause for one of the detaining creditors, cannot, without a power for the purpose, sign for him the note for sixpences.

THE Plaintiff was brought up under the Lords' Act 32 G. 2. c. 28. to be discharged out of custody for costs due to the Defendants on a judgment in their favour in the above cause.

Two of them were ready to sign the note for the allowance of the prisoner's sixpences under the statute, but the third being abroad, the Court held that the attorney who had conducted the cause on the part of the Defendants could not sign for the absent Defendant without a special power of attorney for the purpose, his authority in the cause having terminated with final judgment.

For want of a sufficient note, therefore, the prisoner was

Discharged.

Andrews Serjt. opposed the discharge.

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BARTRAM v. FAREBROTHER.

May 1.

TROVER for thirty-eight hogsheads of ale. At the trial of the cause before *Best C. J.*, *London* sittings after *Trinity* term last, the facts appeared to be as follows:—

Mungo Park had ordered ale of the Plaintiff at *Edinburgh*, the invoice of which reached *Park* on the 29th *October* 1826, when, being in insolvent circumstances, he signified to his clerk that he would not have the ale, and desired him to direct *Vincent*, an attorney, to do what was necessary to stop the goods.

November 2d, twenty-five hogsheads arrived, and on the 3d, *Vincent* wrote a notice to the wharfinger, at whose wharf they were to be landed, not to deliver the ales to the consignee.

On the 4th, thirteen more hogsheads arrived; and on the 6th the whole were landed on the wharf.

On the same day the Plaintiff's agent wrote from *Edinburgh* to the wharfinger, confirming the order not to deliver the ales to the consignee.

On the 7th, *Vincent* sent the wharfinger another notice not to deliver any of the consignment.

On the same day, the Defendant, sheriff of *London*, claimed the goods under an execution issued against *Mungo Park*, by *Adam Park*, his uncle, and left the warrant for seizure.

On the 11th, another agent of the Plaintiff demanded the whole, and

was not ended by the arrival of the goods at the wharf and the order given by *P.*; and that the consignor had a right to stop *in transitu*.

P., to whom goods were consigned, said, on their arrival at a wharfinger's, that he would not have them, and directed an attorney to do what was necessary to stop them.

The attorney, on the 3d of *November*, gave the wharfinger an order not to deliver them to the consignee, which order the consignor wrote to confirm on the 6th; on the 7th the goods were claimed under an execution at the suit of *A.*:

Held, that the contract between *P.* and the consignor was rescinded; that the *transitus*

On

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On the 13th, the Defendant, the sheriff, removed the sales under the execution.

A verdict having been given for the Plaintiff,

Wilde Serjt. moved to set it aside, and enter a non-suit instead, on the ground that *Mungo Park* had never rescinded his contract with the Plaintiff, but had merely endeavoured to stop the goods *in transitu*, which was not effectually done; first, because the transit was at an end; and, secondly, because *Vincent* was not the agent of the Plaintiff, the consignor, who alone had the power to stop, but of *Park*, the consignee. A rule *nisi* was granted, and

Cross Serjt. shewed cause, contending that the contract was rescinded by *Park's* saying he would not have the goods, and the Plaintiff's assenting to the stoppage ordered by *Vincent*; which assent, by ratification, made *Vincent* his agent for that purpose. He relied on *Salte v. Field* (a), and *Atkin v. Barwick*. (b)

The Court here called on

Wilde to support his rule. He maintained that *Park* had done nothing to rescind the contract; but had merely given an order to stop the goods; an order which could only be valid when given by a consignor. But the circumstance of his giving that order was such an assertion of dominion over the goods as shewed them to be constructively in his possession, and, consequently, the transit to be at an end. If he had revoked the order, the Plaintiff might have been compelled to complete the contract.

Vincent was not the agent of the Plaintiff; and

(a) 5 T. R. 211.

(b) 1 Str. 165.

though

though the Plaintiff might by subsequent ratification adopt an act of *Vincens's* as against a party who had contracted with the Plaintiff, yet he could not do so to the prejudice of third persons. The authority of *Atkin v. Barwick* had always been doubted. *Per Chambre J.* in *Richardson v. Goss (a)*, and *Kemyon C. J.* in *Neate v. Ball. (b)*

Salte v. Field was decided on the ground that there was no contract subsisting; not that a subsisting contract had been rescinded. But in *Smith v. Field (c)*, where the vendee wished to return the goods, and the vendor instituted an attachment to attach them in the hands of a packer, as the property of the vendee, it was considered as an election by the vendor not to rescind the contract; and the vendee having since become a bankrupt, it was held that the vendor could not recover the goods from the packer in trover. And in *Barnes v. Freeland (d)*, it was decided, that where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent, before they are paid for, he cannot rescind the contract, and return the goods with the consent of the seller, so as to give the seller preference to his other creditors.

In *Neate v. Ball*, a trader to whom bags of wool were delivered pursuant to order, had, by the course of dealing, the option of returning the wool for which he had no call, though previously ordered. The trader being from home when the bags were delivered, on his return, the same day, gave directions not to have them opened or entered in his books, but only weighed off, to see that they agreed with the invoice; he being then in embarrassed circumstances, and intending not to take them into the account of his stock, if in the event he

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(a) 3 B. & P. 127.

(b) 2 East, 123.

(c) 5 T. R. 404.

(d) 6 T. R. 81.

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found himself unable to pursue his business. Afterwards, being avowedly insolvent, he returned the bags, with a letter to the merchants, declaring his situation, hoping that they would have no objection to take back the wool, and requesting the favour of a line in approbation; the letter having been received, and the approbation given, after an act of bankruptcy committed on the same day, it was held, that by the trader's keeping possession of the goods so long, his option was gone; that, being in a state of insolvency, he could not exercise the power of restoring the goods to the vendors, though without any fraudulent concert with them; but that his assignees were entitled to the property.

That was a stronger case in favour of the vendor than the present, because the vendee had, by custom, the right of returning such goods as he did not want; whereas there was no custom to warrant the return in the present instance.

BEST C. J. This is an action against the sheriff, for taking in execution certain goods as the goods of *Mungo Park*, at the suit of one of *M. Park's* family. Now, when can an execution creditor take goods which his debtor has purchased? When the contract between the vendor and vendee is complete. If the contract be only suspended, that is enough to prevent the execution creditor from taking. But the contract here was altogether put an end to. The goods had been sold by a person in *Scotland*. On the 3d of *November* the vendee says, "I decline having them;" he then proceeds to effect his repudiation of the contract in a clumsy way, by telling his clerk to order *Vincent* to stop the goods; but what he proposed and intended was, to get rid of the contract. This proposal, however, unless assented to by the vendor, would not have sufficed for the purpose; but notice was given to the wharfinger on the 3d, and
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on the 6th, one day before the goods were claimed in execution, the vendor agreed to the proposal. It has been asked, what would have been the consequence if the vendee had revoked his order to stop the goods? But it is sufficient for the present case to say that it was not revoked, and that on the 3d of November there was a clear intention to put an end to the contract. Now, without referring to cases, it is perfectly clear, that till the rights of third persons have intervened, contracting parties have a right to rescind a contract; and here, at the time the contract was rescinded, no such rights had intervened. But the point has been decided in *Atkin v. Barwick*. I do not go the whole length of the positions laid down in that case; it is sufficient, however, if we should have decided in the same way, though not entirely for the same reasons. That was a case of bankruptcy, and it should be said for *Pratt C.J.*, that the doctrine touching matters done in contemplation of bankruptcy, was subsequently introduced into *Westminster Hall*. The case, however, was confirmed by *Salte v. Field*, where the property of goods bought by an agent for the vendee, and delivered by him to the vendee's packer, in whose hands they were attached by the vendee's creditors, was held to revest in the vendor, so as to avoid the attachment, by the vendee's having countermanded the purchase by letter to his agent, dated before such delivery, though not received till afterwards, the vendor assenting to take back the goods.

That case was not decided, on the ground that no contract had existed. Lord *Kenyon* says, "It was in the power of the buyer and seller to put an end to the contract as if it had never existed; and it is stated that the proposition made by the purchaser to rescind the contract was acceded to by the sellers." That shews that the principle was, not that no contract had existed, but that a contract had been rescinded. *Salte v. Field*

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was recognised in *Smith v. Field*, where the decision was different, because the rights of third parties had intervened; but Lord *Kenyon* took care not to impugn the principle established in *Salte v. Field*, saying, "In the former case of *Salte v. Field*, the Court went as far as they could to assist the sellers; but there both the buyer and seller agreed to rescind the contract before the bankruptcy." Each of the Judges confirmed the decision in that case, and also in *Atkin v. Barwick*. *Barnes v. Freeland* does not shake the authority of the previous cases. Lord *Kenyon* says, "I cannot distinguish the present case from that of *Harman v. Fisher* on principle; for this bankrupt knew his insolvent situation at the time when he wished to deliver back the goods in question to the defendant, as well as *Fordyce* did in that case; there, *Fordyce*, finding that he was insolvent, was anxious to repay to the defendant some bills which the latter had lent him; and though those bills were as easily distinguishable from the rest of his effects as the iron in question was from the rest of this bankrupt's property, the Court there held, that it could not be done, because it would prejudice the other creditors of the bankrupt. Three cases, however, have been cited and pressed upon us, as deciding the present; but I think they are to be distinguished from this. In *Atkin v. Barwick* the vendees, finding that their affairs were in a declining condition, before the goods arrived at their house in *Cornwall*, refused to accept the goods, and thereby refused to become parties to the contract of sale: and though, when the goods did arrive by the waggon, the vendees could not turn them loose in the streets, yet they did what was tantamount to rejecting them, they sent them to a friend of the consignors for their use. In *Salte v. Field*, consider who was the party to the contract; not the clerk of the vendee, who lived in *London*, but *Dewhurst*, who was residing in *New York*; and he, knowing his insolvent situation,

situation, sent orders a month before the transaction in dispute took place, to his clerk here, not to purchase any more goods for him. The clerk immediately on the receipt of this order, applied to the vendors to take the goods back again, who agreed to rescind the contract." *Barnes v. Freeland* was decided on the ground that the acts were done in contemplation of bankruptcy; but in the present case there having been no bankruptcy, that principle does not apply.

It has been argued that the goods in the present case were finally delivered before the stoppage took effect; but it has never been held that goods in the hands of a carrier or wharfinger have been finally delivered except where the wharfinger has actually been the agent of the consignee; and those cases have all turned on attempts to defeat a general body of creditors. In the present case the goods were not in the hands of the vendee, nor were they stopped to defraud a general body of creditors; there is no ground therefore for impeaching the verdict which has been given, and the rule must be discharged.

PARK J. Stoppage *in transitu* is a right conferred on meritorious persons, and is not, as it has been argued, a hardship on any one. With regard to the decision in *Atkin v. Barwick*, it was sanctioned in *Harman v. Fisher* (a), although some of the reasoning in the case was not agreed to.

Salte v. Field came next. I argued the case, and did not succeed. It was determined that a contract had been entered into, and that it had been rescinded. In this all the Judges concurred. In *Smith v. Field*, which followed shortly afterwards, the Court recognized the decision in *Salte v. Field*, but distinguished

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(a) *Cowp.* 125.

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Smith v. Field from it, because the rights of third parties had accrued before the contract was rescinded. And in *Barnes v. Freeland*, where the preceding cases were all recognized, the Court said, "The contract here was not rescinded before the insolvency of the vendee. After the contract for the sale of the iron, it was actually delivered to the vendee, and put into his cellar, and he gave a bill of exchange for the payment of it; then the contract was complete, and could not be rescinded by any subsequent act of the parties, so as to affect the interests of third persons." The question seems to me clear in point of law, and the rule must be discharged.

BURROUGH J. The question is clear in point of fact, and that is the chief thing in cases like the present. The goods were stopped before they were delivered to the vendee.

GASELEE J. concurred, and the rule was

Discharged.

April 25.

AXFORD v. PERRETT.

Allowing two years to elapse without proceedings, Held to be a breach of the condition in a replevin-bond to prosecute

the replevin without delay, and that the obligee might recover on such breach, although judgment of *non-pros* was never signed in the county court.

THIS was an action on a replevin-bond, for not prosecuting with effect and without delay the suit in replevin, according to the condition of the bond. Pleas: 1st, *non est factum*; 2d, after setting out the condition on oyer, that Defendant did prosecute with effect and without delay; and, 3d, that he did duly

appear

appear and prosecute according to the condition of the bond, and that the suit was still pending. Replication, that the Defendant did not prosecute his suit according to the form and effect of the condition in the bond.

At the trial before *Gaselee J.*, last *Salisbury* Spring assizes, it appeared that for more than two years previous to the commencement of this action, the Defendant had taken no step in the replevin cause; that shortly before the commencement of this action he applied to the county clerk to enter continuances and proceed with the cause, which was refused, the county clerk alleging then, and at the trial, that after three courts had elapsed without any proceedings being had, the cause, by the practice of that county, was out of court. For the Defendant, the predecessor of the county clerk stated, that during all the time he held the office, a cause was considered to be in existence till a *non-pros* was entered; and that, unless that were done, continuances might be entered after any lapse of time.

A verdict was taken for the Plaintiff, the learned Judge being of opinion, that the Defendant had not prosecuted the replevin suit without delay.

Wilde Serjt. now moved to set aside this verdict, and, assuming that the testimony of the older clerk of the county was the more worthy of credit, contended, that, according to that testimony, the replevin suit was still existing; and that, while a cause existed, according to the practice of the court in which it was pending, it could not be said to be delayed: he referred to *Brackenbury v. Pell* (a), where, to an action on a replevin-bond conditioned for the defendant to prosecute his suit with effect, it was held sufficient to plead that the defendant did appear at the next county court, and prosecute his suit, which was still depending, and that it was not

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(a) 12 East, 585.

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sufficient to reply that the defendant abandoned his suit, and that it was not still pending, without shewing also how it was determined; and to *Elworthy v. Bird* (a), to shew that a discontinuance could not take place except by act of the Court. But

The Court observing that the decision in *Brackenbury v. Pell* was on special demurrer to the replication, and not after a verdict which found that the defendant had not prosecuted his suit according to the effect of the condition, held, that after the time which had elapsed without any proceedings, the replevin cause, by analogy to the practice of the higher tribunals, was out of court, and that, at all events, the Defendant had not prosecuted his suit without delay.

Rule refused.

May 2.

HUNT v. BLAQUIERE.

Bail at the request of the Defendant's attorney admissible, if not indemnified by him.

ONE of the bail in this case admitted that he had become bail at the request of the Defendant's attorney; whereupon

Wilde Serjt. objected that he was inadmissible under the rule which had been made for the protection of attorneys; but

PARK J. said he was not inadmissible on that account, unless he was also indemnified by the attorney; and that the rule was quite clear.

The rest of the Court (b) concurring, the bail was
Allowed.

(a) 2 *Bingh.* 258.

(b) *Best C. J.* had not arrived.

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KNIGHT and Another v. LEGH.

May 2.

THIS was an action of trover, brought by the Plaintiffs against the Defendant, to recover damages for the conversion of a bill of exchange by the Defendant to his own use. At the trial of the cause before Best C. J., at the sittings in London, after Michaelmas term 1826, the jury found a verdict for the Plaintiffs, for the damages mentioned in the declaration, subject to the opinion of the Court on the following case:—

The bill of exchange, for the conversion of which the action was brought, was drawn the 5th November 1821, by one Thomas Claughton upon the Defendant, requesting him, eighteen months after date, to pay to the said Thomas Claughton's order 3500*l.*, value received, which bill was afterwards, and before its negotiation, accepted by the Defendant.

The bill having been endorsed by Claughton, he, on the 8th December 1821, delivered the same, with other bills of a like description, to one Thomas Farquarson, who, with his consent, delivered the bill to one John Everth, for the purpose of raising money thereon by discounting or procuring a deposit thereon, and such money, when raised, was to be employed, partly in making up the capital of Everth in a gun-manufactory in which he was interested, and for which Claughton engaged to advance funds to a larger amount than the bill in question, and partly for other purposes of Claughton, in which Everth had no concern.

had previously sued him, and had recovered by the award of an arbitrator the amount of his advance.

E. being indebted to Plaintiffs, agreed to deposit with Plaintiffs, as agent to P., a bill of exchange, as security for a sum advanced by P.; and having deposited the bill with Plaintiffs, wrote to them as follows:—
“The bill you will hold, subject to P.’s advance; and also for any advances or expenses you have against me.” The bill having been, at the instance of the acceptor, surreptitiously taken by the Defendant, Held, that the Plaintiffs might sue, and recover against him in trover, although P.

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In the month of *February* 1822 *Everth* applied to the banking-house of Sir *Peter Pole* and Co., who consented to advance to him the sum of 1000*l.*, upon the security of the bill; and it was agreed between *Everth* and the bankers that, inasmuch as *Everth* had not at that time any account at the said banking-house, the amount of the said advance should be debited in the account of Plaintiff, *Knight*, kept by him at the bankers, he being the solicitor, both of the said bankers, and of *Everth*, and that the bill should be deposited with the Plaintiff, *Knight*, as agent for the bankers, until the sum of 1000*l.* should be repaid by *Everth*.

The bill was accordingly placed in the hands of Plaintiff, *Knight*, for that purpose, and on the 29th *March* the money was advanced.

On the 2d *April* 1822 *Everth* addressed a letter as follows to the Plaintiff *Knight*:

"The bill of 3500*l.* drawn by *Thomas Claughton* upon *Thomas Legh*, of *Lyme Park*, upon which you were kind enough to procure me the advance of 1000*l.* from Sir *P. Pole*, Bart., and Co., you will please to hold, subject, of course, to that 1000*l.*, as, also, for any advances or law expences you have against me, or that may be advanced or incurred on my account, or that of the patent gun factory, for which purpose, more particularly, the bill was handed to me.

"From the conversation which took place with Mr. *Claughton*, on *Sunday* last, I should not be surprised if proceedings should be instituted by that gentleman against my friend Mr. *Farquarson*, his former agent, against whom he appears to be much irritated, without, as far as I can see, any adequate cause; and in that event he necessarily must require some professional assistance, and, as I know from experience, he cannot be in more
able

able hands than yours, I shall feel obliged by your acting as his solicitors, and I will engage to pay all the expences you may incur on his account, arising out of such proceedings, for which, also, you will hold the bill as your security."

Prior to, and at the date of this letter, *Everth* was under acceptances to a large amount, exceeding the amount of the bill in question, of which acceptances the Plaintiffs were aware, none of which were ever paid by him, but all afterwards taken up by Defendant *Legh*.

At the time of the date of the letter, the Plaintiffs were, and for many years previously had been, the solicitors for *Everth*, who was then indebted to them in a considerable sum for professional business transacted on his account, and became further indebted to them, subsequently to the date of the letter, both on his own account, and, also, in respect of the gun factory.

In the month of *August* 1822 *Everth* applied to the Plaintiff *Knight*, stating that a person of the name of *Thornhill* could get the bill discounted, provided the parties were satisfied that the hand-writing of the drawer and acceptor were genuine, and requested the Plaintiff *Knight* to entrust the bill with *Thornhill* to get the same discounted, which the Plaintiff *Knight*, with the approbation of Sir *Peter Pole* and Co., consented to do.

The bill was afterwards taken by *Thornhill's* agent to the banking house of *Coutts* and Co., the bankers of the Defendant, and shewn to Sir *Edmund Antrobus*, one of the partners of that firm, to ascertain whether the acceptance of it was in the hand-writing of the Defendant; whereupon one *Sweetman*, who was authorised by *Cloughton* to seize and detain the bill, asked Sir *E. Antrobus* to let him look at the indorsement, took it

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it out of the hands of Sir *E. Antrobus*, went away with it, and by the authority of the Defendant detained it; and the jury found that Defendant thereby converted the bill to his own use.

The said sum of 1000*l.* so advanced by Sir *P. Pole* and Co. still remaining due and unpaid to them, they, in *Easter* term 1824, brought an action of trover against the Defendant and *Cloughton* for the conversion of the bill as aforesaid, in the Court of King's Bench, which cause being by order of the Court referred to a barrister, (a *nol. pros.* being first entered as to *Cloughton*,) the arbitrator in *November* 1825, found and awarded that the Defendant was guilty of the premises laid to his charge in the declaration in the action of Sir *P. Pole* and Co., and that they had thereby sustained damages to the amount of 1182*l.* 9*s.* 4*d.* which he awarded in respect of the premises; and which sum of money and the costs were paid accordingly.

The arbitrator in his award recited, that on the hearing of the arbitration, the Plaintiffs, Sir *P. Pole* and Co., proposed to produce before him evidence to prove that certain persons, other than themselves, had claims upon and were interested in the said bill; and that if the same, when arrived at maturity or afterwards, had been paid in full, part of the money so paid would have been paid to and for the use of such other persons; and the arbitrator further recited, that he refused to receive such evidence, and that he had not awarded any damages against the Defendant in respect of the claims of any persons other than the Plaintiffs Sir *P. Pole* and Co.

The case was left by the Chief Justice to the jury with a direction, that if they thought the Plaintiffs were ignorant of the limited authority of *Everth*, and had no reason to suspect it, they should find for the Plaintiffs,
if

if otherwise, for the Defendant; and the jury found for the Plaintiffs.

The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover damages to the extent of their lien upon the bill, for the conversion thereof by the Defendant as stated in the case.

If the Court should be of opinion that the Plaintiffs were entitled to recover, the verdict was to stand; if not, a nonsuit was to be entered.

Wilde Serjt., for the Plaintiffs, argued, that by the express terms of *Everth's* letter the Plaintiffs acquired a lien on the bill in question, which sufficiently entitled them to sue in trover; and that if *Sir P. Pole* and Co. had any claim to the bill, that claim was subject to a prior right in the Plaintiffs, who had no means of interfering in the action brought by *Sir P. Pole* and Co. In *Morris v. Robinson* (a), where the owners of a cargo brought an action on the case against the owners of a ship for wrongfully selling the cargo instead of carrying it to *London*, according to their contract, and having recovered a general verdict for the amount of the value of the ship and freight, which was only one-fifth of the value of the cargo, brought another action against the purchaser of the goods; it was holden, that the recovery against the owners of the ship was no answer to the action against the purchaser of the goods. But if, as in that case, one Plaintiff might sue different Defendants in distinct actions in respect of one injury, it might be inferred that different Plaintiffs, sustaining distinct injuries arising out of one transaction, might sue the same Defendant in distinct actions in respect of that transaction.

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(a) 3 B. & C. 196.

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Peake Serjt. for the Defendants. The bill was placed in the hands of the Plaintiffs only as agents for Sir *Peter Pole* and Co., who advanced the 1000*l.* on the security of the bill. It was clear from the action brought by them and the award of the arbitrator, that the property in the bill was in Sir *P. Pole*; and as it could not be at the same time in two parties who claimed on distinct rights, the Plaintiffs had not such a property in it as was sufficient to support an action in trover. In *Morris v. Robinson*, there was no dispute about the Plaintiffs' title, and the only question was, whether, if he recovered in the second action, he would not be recovering twice in respect of the same injury.

BEST C. J. The plaintiffs in this case had a general property in the bill, for the detention of which they sought to recover damages, and a right to the possession of it. The bill was not in the hands of *Knight* merely as agent to Sir *P. Pole* and Co.; he held it as his own security for a debt due to him from *Everth*, for professional services; and it must be observed that the banking-house on advancing the 1000*l.* did not debit *Everth* with that sum, but *Knight*; it was, therefore, agreed that he should hold it in his own right as against *Everth*, but he had also a right to hold it as against the bankers, as a security for the repayment of the 1000*l.* advanced to *Everth*, in case the bankers should have called on him (*Knight*) to pay that 1000*l.*, he being the person debited by them. However, supposing *Knight* to have held the bill merely as agent of the bankers, still he was a lawful bailee, and had actual possession, which would have entitled him to support the action as against a wrong-doer. Even if the bill had been pledged to the bankers, the instant their debt

was

was paid, *Knight* held it as a security for his own bill of costs, and that right had arisen previously to the commencement of this action. There is, therefore, no objection, in point of form, to his recovering in this action; nor is there any in substance, because the bill was the Plaintiffs' security for the due remuneration of services performed. It is objected that they ought not to recover, because *Sir P. Pole* and Co. have recovered already in respect of the same bill. It may be esteemed doubtful, whether *Sir P. Pole* and Co. had any right to sue; and whether the action, even as far as they were concerned, ought not to have been brought in the name of *Knight*; the arbitrator, however, has in that action properly limited the damages to *Sir P. Pole's* interest in the bill. But supposing that they were entitled to sue, it does not follow that another person, who has a distinct claim in respect of the same bill, may not sue also. The case referred to shews that the same plaintiff may bring separate actions against several parties in respect of the same injury, where he does not obtain adequate redress in the action against the party first sued; and there seems to be no reason why different Plaintiffs who have different rights, should not sue the same Defendant in respect of separate injuries, though arising out of one transaction.

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PARK J. The whole case turns on four lines in *Everth's* letter of *April 2d.* "The bill of 3500*l.* on which you were kind enough to procure me the advance of 1000*l.* from *Sir P. Pole* and Co. you will please to hold, subject of course to that 1000*l.*; as also for any advances or law expences you have against me, or that may be advanced or incurred on my account, or that of the patent gun factory, for which purpose more particularly the bill was handed to me." Here was the lien

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lien created, and the Plaintiffs were entitled to hold the bill till they had obtained full remuneration.

BURROUGH J. concurred.

GASELEE J. No doubt Sir *P. Pole* and Co. were entitled to 1000*l.* on the security of this bill, and the Plaintiffs were also entitled in respect of their advances and law expences. Strictly speaking, perhaps, the two actions were proper, and it must have been immaterial to the Defendant whether the first were brought in the name of Sir *P. Pole* or any other person; if he has to pay the costs of two actions it is his own fault. The general property in the bill, however, was not in Sir *P. Pole* and Co. but in the Plaintiffs; Sir *P. Pole* and Co. had only a special property in it. It has been objected that the Plaintiffs only held the bill as agents; but even if that were so, they were agents only till Sir *P. Pole* and Co. were paid; when that was done, they held the bill for *Everth*, and *Everth* then says, "hold it for yourselves, to cover your advances and law expences;" that vested in the Plaintiffs the general property in the bill, and the judgment must consequently be for them.

Judgment for the Plaintiffs.

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PRICE and Another, Assignees of LATHAM, a
Bankrupt, v. HELYAR.

May 4.

THIS was an action of trover brought by the Plaintiffs, who were assignees of the estate and effects of *Latham*, a bankrupt, against the Defendant, late sheriff for the county of *Somerset*. At the trial before *Burrough J.*, last Spring assizes for the county of *Somerset*, a verdict was found for the Plaintiffs, damages 186*l.* 2*s.* 9*d.*, subject to the opinion of this Court on the following case:—

A sheriff, who takes in execution the goods of a bankrupt, is liable in trover to his assignees, although he has no notice of the bankruptcy, and a commission has not been sued out at the time of the execution.

Acts of bankruptcy were committed by *Latham* in the month of *August*, *September*, and *October* 1826. On the 14th *November* 1826, the Defendant then being sheriff of the county of *Somerset*, seized in execution certain effects of the bankrupt by virtue of a *fi. fa.* issued at the suit of one *Maimd* against the bankrupt, returnable in eight days of *St. Martin*. The officer took possession of the goods in the afternoon in *Latham's* house, and retained such possession there until the following morning, when, upon the bankrupt's paying to him the sum of 71*l.*, being a sum sufficient to pay the amount of the damages ordered to be levied, (but somewhat less than the amount which might have been levied for poundage, &c.) he relinquished such possession. The officer stated that he did nothing to the goods, but that he should have proceeded to a sale if the bankrupt had not paid him the money.

On the 15th *November* 1826, the Defendant then being sheriff of the county of *Somerset*, also seized and took in execution in *Latham's* house certain of his effects, being part of those for which this action was brought,

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brought, by virtue of another *fi. fa.* at the suit of one *Luce*, against the bankrupt, which writ was returnable on the *Tuesday* next after eight days of *St. Martin*.

The officer remained there in the possession of the goods two days, at the end of which time the bankrupt paid to the officer 115*l.* 2*s.* 9*d.*, the amount ordered to be levied, when he relinquished possession, and the officer did nothing to the goods but take and keep possession thereof as aforesaid, but stated that he would have proceeded to a sale but for such payment.

On the 17th *November* 1826, the sheriff paid over to *Maund's* attorney, and on the 25th to *Luce's* attorney, the respective sums ordered to be levied in obedience to the writs.

On the 11th *January* 1827, the commission of bankrupt issued against *Latham*, and he was declared a bankrupt on the 24th of the same month. Neither the sheriff nor his officers knew or had notice of any acts of bankruptcy at the time of the respective executions or at the time of the payment of the money to the respective plaintiffs in the executions. The first intimation of the commission was communicated by the Plaintiff's attorney to the under-sheriff, by letter, on the 18th *January*.

The question for the opinion of the Court was, whether under the circumstances stated in this case the action was maintainable against the sheriff. If the Court should be of opinion in the affirmative, the verdict was to stand; but if the Court should be of opinion the action was not maintainable, a nonsuit was to be entered.

Stephen Serjt. for the Plaintiffs. The goods were the property of the Plaintiffs by relation to the act of bankruptcy; there was a conversion of them by the sheriff, and he is liable notwithstanding his official character.

Upon

Upon the first point the bankrupt acts are clear. Upon the second there would be as little doubt, but for what fell from Lord *Ellenborough* in *Wyatt v. Blades* (a), where he threw out that if the sheriff had not removed the goods it would have been difficult to say there had been a conversion. Undoubtedly the goods were not removed in the present instance, but they were, in effect, sold, which was not the case in *Wyatt v. Blades*, and which indisputably amounts to a conversion, *M'Combie v. Davis* (b) and *Shipwick v. Blanchard* (c) having decided that obtaining money by the assignment or seizure of goods is in effect the same thing as selling, while the *dictum* in *Wyatt v. Blades* was merely extrajudicial. If the Defendant had been an ordinary person no argument could have been raised: but it will be said that he acted by compulsion in the performance of his official duty; that he was ignorant of the bankruptcy, and had no means of knowing it; and that it will be a great hardship to punish him for doing that which he might also have been punished for not doing.

The hardship is no argument if the law be clear; and the bankrupt act has made no exception in favour of the sheriff. But there are many cases in which the law has thrown a similar responsibility upon the sheriff; for instance, bail: if they do not justify, the plaintiff looks to the sheriff; he is in contempt of court; technically speaking, criminal; and responsible for the consequences. The sheriff is indisputably liable where he takes the goods of *A.* by mistake for those of *B.*, and yet he has often no means of discovering in whom the property is vested. The law contains no such principle as that a man shall be irresponsible because he acts in ignorance of a paramount title. A servant cannot disobey the order of his master; yet if he commit a trespass

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(a) 3 *Camp.* 396.(b) 6 *East*, 537.(c) 6 *T. R.* 298.

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under his master's directions, although he be ignorant of the wrong, he is liable to the injured party. The servant acts by virtue of a higher authority as much as the sheriff, and it makes no difference that the sheriff is clothed with an official character; the object of the law is to give effect to the rights of parties. But the point has been expressly decided in *Potter v. Starkie*, cited in argument in *Stephens v. Elwall* (a), and from various recent treatises it appears that such has been the general understanding. In *Potter v. Starkie*, it is said, this follows from the decision in *Cooper v. Chitty*. (b) The circumstances in that case were somewhat different from the present; for there the sheriff made a bill of sale of the goods after a commission of bankrupt had issued against the possessor, and the commission might have been esteemed notice of the bankruptcy. The decision, however, did not turn on that circumstance, but on the distinction between trespass and trover. This is expressly stated in the report in *Blackstone* (c), and is obviously to be collected from Lord *Mansfield's* judgment, as reported by *Burrow*. And the distinction is not without sufficient ground; for it might be too much to make the sheriff, by relation, obnoxious to special and perhaps vindictive damages in an action of trespass, or even to indictment; and yet, without making him criminal, it may be expedient to leave him responsible for civil rights. On this point *Smith v. Mills* (d) is a confirmation of the distinction so taken in *Cooper v. Chitty*; for in *Smith v. Mills* it is expressly decided that trespass will not lie against the sheriff for selling a bankrupt's goods under an execution after an act of bankruptcy, and before commission; and, consistently with that case and *Cooper v. Chitty*, *Potter v. Starkie* has decided that trover will.

(a) 4 M. & S. 259.

(b) 1 Burr. 20.

(c) 1 Bl. Rep. 68, 69.

(d) 1 T. R. 475.

What

What fell from the Court in *Timbrell v. Mills* (a) was purely extra-judicial, and irreconcilable with the express decision in *Cooper v. Chitty*. If the object of that decision were to protect the rights of the creditors by leaving the sheriff civilly responsible in trover, it could not have turned on the circumstance that the sale took place subsequently to notice of the bankruptcy furnished by the commission; otherwise, supposing a sale to have taken place under those circumstances, and the goods to have been sold for half their value; if the assignees could only sue for the money received, they must put up with the loss upon the sale, instead of being entitled to recover the goods themselves, or their full value.

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Merewether Serjt., for the Defendant, contended, that as far as the sheriff was concerned, there was no substantial distinction between trespass and trover; liability to either being in effect a punishment to the sheriff, and the difference lying only in degree: and he relied on the hardship and injustice, not to say absurdity, of punishing the sheriff by attachment, if he refused to execute the writ, and punishing him by damages, if he executed it, although without any means of knowing that a bankruptcy had taken place. He denied the authority of *Potter v. Starkie*, of which there was no authentic or detailed report, and contended that the principle established by *Cooper v. Chitty*, and the cases cited in it, was, that the sheriff should not be liable as a wrongdoer, where he fairly did his duty: not in trespass for entering in discharge of that duty, nor in trover for retaining possession of goods after entry, provided he had no notice of any paramount title, such as the commission actually issued in *Cooper v. Chitty*. A servant was not compellable to obey his master when he en-

(a) 1 Bl. Rep. 205.

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joined a trespass; and ordinary individuals who took the goods of a bankrupt, after a secret act of bankruptcy, were not compelled to such a proceeding. But the sheriff must act in obedience to the writ, and could not refuse to proceed. The utmost length to which the Courts could go, would be to compel him to prove that he had paid over the money levied before he received notice of the commission. *Lee v. Lopez.* (a) In that case, a tenant having committed an act of bankruptcy in *October* 1810, upon which a commission issued on the *21st January* 1811, and the sheriff having, on the *7th January*, levied an execution for a judgment debt of 600*L.*, under which he sold the goods of the tenant, on the *21st and 22d January*, for 520*L.*, and out of that sum, when received, paid the landlord 140*L.* for one year's rent in arrear, it was held, in an action for money had and received, brought by the assignees of the bankrupt-tenant against the sheriff, to recover the whole amount of the sum levied, that the property of the goods being changed by the act of bankruptcy and commission, and transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the landlord and execution-creditor before he had notice of the commission issued; and not giving such proof, that he was liable for the amount to the assignees.

Cur. adv. vult.

BEST C. J. This was an action of trover, brought by the assignees of a bankrupt against the sheriff of *Somersetshire*, for selling goods of the bankrupt, under an execution, after the act of bankruptcy, but before the commission issued. Upon the argument two questions were raised; first, whether the sale of the goods, without

(a) 15 *East*, 230.

removal,

removal, would have amounted to a conversion in an ordinary case; which was ultimately admitted: secondly, that, at all events, the sheriff was not responsible, having only done what the duty of his official situation required.

Liability to this action is, undoubtedly, a hardship upon the sheriff, but our province is to expound the laws, not to make them, and, considering the question on principle, we entertain no doubt. By the policy of the bankrupt laws the transfer of a bankrupt's property to his assignees has relation back to the act of bankruptcy; from that moment it is divested out of the bankrupt, and vested in his assignees; whoever takes it takes the property of the assignees, and is liable to the consequences of so taking it. It is incumbent, therefore, on the sheriff, who seeks to excuse himself, to shew some law which exempts him from this liability: if he cannot do so he stands in the same situation as he would do in an action for taking the property of *A.* where the writ directed him to take the property of *B.* But the statutes make no exception in favour of the sheriff; the cases are all against him; and if they were not, they would be in the teeth of the statutes. We were anxious, however, to enquire about the case of *Potter v. Starkie*, and we learn from *Richardson J.* that the report of that case in the argument in *Maule and Selwyn* is accurate; that the Court of Exchequer did decide in the manner there stated, and gave the reason there assigned — that the case depended upon the previous decision in *Cooper v. Chitty*; and we think the case of *Cooper v. Chitty* embraces the principle on which we now decide.

If we take the report in *Blackstone*, the case is conclusive, and though that report contains expressions which are not to be found in the report in *Burrow*, and was published after the death of the learned writer, without having received his final corrections, it is probably correct as to the judgment of the Court; and

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what is represented as having been said extra-judicially, in *Timbrell v. Mills*, viz. that "the whole Court declared that it was allowed in that case (*Cooper v. Chitty*), that if the sheriff levies the money and pays it to the plaintiff before any commission issued, and without notice of the act of bankruptcy, he will, at all events, be safe," is so much at variance with the decision in *Cooper v. Chitty*, that it must be a mistake. The report, however, of *Cooper v. Chitty*, as it is given by *Burrow*, lays down the principle which governs our decision upon the present occasion. Lord *Mansfield* takes the distinction between trespass and trover, which shews the impression on his mind as to the propriety of refusing to subject the sheriff to an action of trespass, although he might properly be held responsible in trover, for he says: "This action lies, and has been brought in many cases where in truth the defendant has got the possession lawfully; where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten; hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action for having taken it; the whole act consists in the wrongful conversion."

In trespass, therefore, a party is liable if he takes the thing only for an instant; in trover, not, unless he proceeds to a conversion. His Lordship goes on to state that the statutes concerning bankrupts vest in the assignees all the property that the bankrupt had at the time of the bankruptcy, and make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy. Then he says, "Dispositions by process of law are put upon the same foot with dispositions by the party; to be valid they must be completed before the act of bankruptcy:"—This destroys the argument which

which has been derived from the circumstance that the sheriff acts compulsorily in execution of a duty:— He proceeds: “ Till the making of 19 G. 2. c. 32., if the bankrupt had *bonâ fide* bought goods, or negotiated a bill of exchange, and thereupon, or otherwise in the course of trade, paid money to a fair creditor, after he himself had committed a secret act of bankruptcy, such *bonâ fide* creditor was liable to refund the money to the assignees, after a commission and assignment; and the payment, though really and *bonâ fide* made to the creditor, was avoided and defeated by the *secret* act of bankruptcy.” Taking the whole together it shews that, in the opinion of his Lordship, the sheriff and the private individual stand in the same situation, and that the hardship is the same on both. He goes on,—Cases were cited “ to prove the taking lawful, and that, therefore, the sheriff shall not be liable to an action. The fallacy of the argument, from the authority of these cases, turns upon using the word *lawful* equivocally, in two senses: to support the act it is *not* lawful, but to excuse the mistakes of the sheriff through unavoidable ignorance, it *is* lawful; or, in other words, the relation introduced by the statutes, binds the property; but men who act innocently at the time, are not made criminals by relation; and, therefore, they are excusable from being punishable by action or indictment, as trespassers. What they did was innocent, and, in that sense, lawful; but as a ground to support a wrongful conversion, by sale after a commission publicly taken out, and an actual assignment made, it was *not* lawful.” Certainly there is that distinction between the two cases; in the present no commission had been taken out at the time of the execution, as in *Cooper v. Chitty*; but the whole of Lord Mansfield’s reasoning shews that the conversion by the sheriff, after the act of bankruptcy, by which the property is vested in the as-

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signees, though not criminally punishable, is, nevertheless, not lawful. The case of *Smith v. Mills* is put on the same ground, and rests on the principle established in *Cooper v. Chitty*. A bill is now under consideration to amend the bankrupt laws, and it is probable the attention of the legislature will be called to this subject. But, however hard the case of the sheriff may be, we are clearly of opinion, that this action is maintainable against him. (a)

Judgment for the Plaintiff.

(a) See *Lazarus v. Waithman*, 5 B. Moore, 313., which point, though overlooked upon occasion of the foregoing argument. *Best* C. J. referred to the next day, as having decided the same

May 4.

Ex parte Lady HUTCHINSON, Conusee.

An affidavit of the caption of a fine taken before a consul abroad, is insufficient.

TADDY Serjt. moved that this fine might pass, although the affidavit of the caption of the acknowledgment was administered by a *British* consul at *Boulogne*, the magistrates there and at *Calais* having refused to administer it, on the ground that the statute 6 G. 4. c. 87. s. 20. makes an oath before the consul as valid and effectual as if taken before justices of peace in *England*. In *Ricardo v. Machado* (a), the Court were divided in opinion as to the validity of an affidavit to hold to bail taken before a magistrate, and the refusal of the present application would operate as a great hardship in occasioning delay and expence.

Cur. adv. vult.

(a) 4 B. & C. 886.

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The Court this day determined that the affidavit was not sufficient, the statute only giving the consul the like authority as the magistrates in *England*, and such magistrates having no authority to take an affidavit of caption.

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Taddy therefore

Took nothing.

STORDET v. HALL and Others.

May 5.

ACTION against the Defendants, as carriers by water, for not delivering a cargo in proper condition.

At the trial before *Best* C.J., *London* sittings after *Trinity* term last, the defence was, that the mischief was done by the act of God, which was one of the risks excepted in the bill of lading. It appeared that the cargo was shipped on the 10th *February*, and the vessel, a steam vessel, was then tight and staunch.

The captain expecting to start the following morning, caused the water to be pumped into the boiler on the evening of the 10th, as that operation required two hours, and the heating about three more. For this reason, it was his practice, and the practice of steam vessels generally, when they started in the morning, to fill the boiler the preceding evening.

The next morning it was ascertained that the pipe which conducts the water into the boiler had cracked, that a considerable quantity of water had escaped by this means into the hold, and that much of the cargo was damaged. The pipe was a sound and good one, and its bursting was occasioned by the action

Where damage was done to a cargo by water escaping through the pipe of a steam-boiler, in consequence of the pipe having been cracked by frost, — Held, that this was not an act of God, but negligence in the captain, in filling his boiler before the time for heating it, although it was the practice to fill overnight when the vessel started in the morning.

of

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of frost on the external portion of it. The Chief Justice told the jury, that if the water had been unnecessarily placed in the boiler, or considering the season of the year, improperly left there without heat to prevent the action of frost upon the pipe, the mischief was not occasioned by the act of God, but by gross negligence.

The jury having found for the Plaintiff,

Taddy Serjt. obtained a rule *nisi* for a new trial, on the ground of an alleged misdirection by the learned Chief Justice.

Wilde Serjt., who was to have shewn cause, was stopped by the Court, who called on

Taddy to support his rule. There was no negligence in filling the boiler over night, which is the usual and necessary practice where dispatch is required; the accident was immediately occasioned by the frost; and, in law, *causa proxima non remota spectatur*. It is urged that the action of the frost might have been prevented by fire, but that argument would render useless all exceptions in a bill of lading, for all the excepted risks might be avoided by certain precautions: the king's enemies, by convoy; rocks, by care in navigation; and lightning by conductors. But the meaning of the exceptions is, that the owners shall not be liable where the injury proceeds from these causes, unless it has been occasioned purposely. The question in all such cases ought to be, what was the immediate cause of the loss: *Smith v. Shepherd*. (a)

BEST C. J. No one can doubt that this loss was occasioned by negligence. It is well known that frost

(a) *Abbott on Shipping*, pt. 3. c. 4., 4th edit. p. 263. 269.

will rend iron; and if so, the master of a vessel cannot be justified in keeping water within his boiler in the middle of winter, when frost may be expected. The jury found that this was negligence, and I agree in their verdict.

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 HALL.

The rest of the Court (a) concurred, and the rule was Discharged.

(a) *Park J.* was at chambers.

BENNETT v. DAWSON.

May 6.

THE affidavit to hold to bail in this case was, that the Defendant was indebted to the Plaintiff in 20*l.* lent on a bill of exchange for 37*l.* bearing date *February* 6th 1828, drawn by *Stracey*, accepted by the Defendant, and overdue and unpaid.

Affidavit, that Defendant was indebted to Plaintiff in 20*l.*, for money lent on a bill of exchange, drawn by S., accepted by Defendant, and overdue and unpaid: Held, sufficient, without saying "lent to Defendant."

Laves Serjt. obtained a rule *nisi* to cancel the bail-bond, on the ground that the affidavit was defective, in not stating that the money was lent to the Defendant, or in what character the Plaintiff claimed; he relied on *Fenton v. Ellis* (a), *Humphreys v. Winslow* (b), and *Machu v. Fraser* (c), as authorities to shew that the character in which the Plaintiff claims must appear on the affidavit.

Wilde Serjt. who shewed cause, relied on *Bradshaw v. Saddington* (d), where a similar affidavit was held sufficient.

(a) 6 *Taunt.* 192.
 (b) 6 *Taunt.* 531.

(c) 7 *Taunt.* 171.
 (d) 7 *East*, 94.

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BEST C. J. As the cases are conflicting, we must follow common sense. Perjury might be assigned here, and that is the true principle to go on. We, therefore, think the affidavit sufficient, and the rule must be discharged.

Rule discharged accordingly.

May 6.

BATTHEWS v. GALINDO.

A kept mistress is not incompetent to give evidence for her protector, although she has passed by his name, and has appeared in the world as his wife.

ACTION on a bill of exchange. The defence was usury; to prove which, at the trial before *Best C. J.* (*London sittings after Trinity term last*), the Defendant called *Ann Jakers*; to the admission of whose testimony *Wilde Serjt.* objected, that she had always been held out to the world as the wife of the Defendant: as to which the evidence was, that she had lived in the same house with him for some years, passing all the time by his name; that she had been seen with him in his bedroom, and also walking with him in public; that there were children in the house where they resided, one of whom the Defendant frequently had with him, and admitted to be his. The witness stated that she was not the Defendant's wife, and was permitted by the Court to decline answering the question, to whom the children in the house belonged.

The Chief Justice, on the authority of a case on the *Chester circuit* (*a*) in 1782, before Lord *Kenyon*, rejected the testimony of the witness, thinking that a person in

(a) Referred to by *Richards C. B.* in *Campbell v. Tavernier*, 1 Price, 81.

her

her class ought not to stand in a higher situation than a married woman, and be invested with a degree of credit which the law refuses to a wife. A verdict having been obtained for the Plaintiff,

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E. Lawes Serjt. obtained a rule *nisi* for a new trial, on the ground that the testimony of this witness had been improperly rejected; the rule for excluding the wife of a party never having been extended to his mistress.

Wilde Serjt. shewed cause. The witness was not excluded because she was the mistress of the party, but because she had always been held out as his wife; and the same reasons which render expedient the exclusion of the wife, render expedient the exclusion of a woman who has been held out as the wife. The one is affected by the same interests, and open to the same influence as the other. The evidence as to the intercourse of the witness with the Defendant in the present case, was such as would have been sufficient to prove her his wife, in any civil proceeding except an action for criminal conversation. If he had been sued for goods furnished to her as his wife, it would have been sufficient to shew that she lived with him, passed by his name with his knowledge, and was reputed to be his wife. It would be highly inconvenient if a person to whom credit has been given under such circumstances, should be permitted to defeat a just claim, by coming forward to throw off the character in which the credit has been obtained. If a wife were unexpectedly to come forward and perjurally deny her marriage, in order to save her husband from a claim made against him, the Plaintiff would have no means of encountering such evidence, unless proof of the witness's having been held out in the character of wife were deemed sufficient. The wives of
criminals

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criminals might be tempted to save their husbands by perjury, and defeat the ends of justice, if any woman who had passed as a wife, were permitted, upon emergency, to deny that she stood in such relation to the party. In a case (a) where a criminal called his wife to prove a fact, and upon being told that his wife could not give evidence, proposed to shew that the witness was not his wife, Lord *Kenyon* rejected her testimony; and in *Campbell v. Twemlow* (b), where an arbitrator had rejected the testimony of a woman who had been held out as the wife of the party, *Richards C. B.* said, he should have done as the arbitrator had done. If the rule were different, a person supposing himself in the presence of a wife, might, upon the supposition that she could not appear as a witness, make declarations which might afterwards be unfairly represented by her.

PARK J. I am clearly of opinion that this rule must be made absolute. I agree in the case cited from *Price's Rep.*, but I think it has no bearing on the present. Lord *Kenyon* was right, because the prisoner himself had called the female his wife through the whole trial, and Lord *Kenyon* said that, after that, he could not call on the Court to receive her as his mistress. But the mere circumstance of a woman's cohabiting with a man, though it goes to her credit, is no ground for rejecting her testimony.

BURROUGH J. It appears to have been admitted throughout the trial, that this woman was not the wife of the Defendant. If he had been sued for a debt contracted by her, he might have shewn that she was not his wife, and, as to reputation, it cannot be spoken of,

(a) Cited by *Richards C. B.* in *Campbell v. Twemlow*, 1 *Price*, 81.

(b) *Ubi sup.*

inter vivos; it regards only the dead. The case in *Price* has no application; for the prisoner called the woman his wife through the whole of the trial, and he could not, upon the same occasion, be permitted to turn round and say she was not his wife. I have known women in this situation examined over and over again; in criminal cases as well as others.

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GASELEE J. Without laying it down as a principle that there are no cases in which a party can put himself in a situation to preclude him from saying that a woman, who has passed as his wife, is not such, I think the witness in this case ought to have been received. In *Mace v. Cadell* (a) the plaintiff *Mace* kept a public house, had a licence, and said she was married to one *Penrice*. She went to the *Excise Office*, had his name entered in the books, with a note in the margin "married." *Penrice* had the licence, and continued in possession of the house and goods from that time till he absconded, committing thereby an act of bankruptcy. *Mace*, the plaintiff, first claimed the goods in question, under a bill of sale from *Penrice*; but, afterwards, as her own original property, and denied that *Penrice* and she were married: The Court held, that, after a solemn declaration by the plaintiff that she was married to *Penrice*, and that these were the goods of *Penrice* in her right, she should never be allowed to say, that she was not married to him, and that the goods were her sole property. That is sound law, upon which I have acted at *Nisi Prius*. The ground on which we grant a new trial here is, that the evidence as to the situation of the female was not sufficient to exclude proof that she was not the Defendant's wife: throughout the whole of the trial it was taken she was

(a) *Cowp.* 233.

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his mistress, and she was protected from answering questions as to the parentage of her children.

In *Campbell v. Twemlow* the Court gave no opinion on the point, but the circumstances of the case were very different from the present, for the female had constantly been held out as the wife of the party: the decision, however, turned on the ground that the Court would not interfere with the award of a barrister.

BEST C. J. I am clearly of opinion that my decision at *Nisi Prius* was wrong; but I was led into error by the decision of Lord *Kenyon*, which, I am satisfied, bears directly upon the point. It cannot be material when or where the declarations are made, as to the character in which the female stands; the principle of that case is, that if the female be held out as the wife of the party, she must, in a court of justice, be considered as such; nor can I accede to the position that a party would not be liable in an action for goods furnished to a female whom he had suffered to pass as his wife. But the ground on which I think my decision at *Nisi Prius* wrong, is this, that the principles on which the rejection of testimony rests, have been greatly narrowed in late times, and directed rather to the credit than the competency of witnesses. It is now generally agreed that the principles of our law of evidence are too narrow, and that much inconvenience is produced by a too frequent exclusion of testimony. In *Phillipps's* treatise on evidence, which I refer to, not as authority, but as proof of the understanding of *Westminster Hall* on the subject, the same conclusion is drawn from the decision of Lord *Kenyon*, as I drew from it at the trial; but the true principle to follow on such occasions is that which is stated in *Starkie*, that the witness is not to be excluded, unless *de jure* wife of the party. Where the situation of the female may be changed in a moment, and is so different

different from that of a wife, who cannot be separated, it is much better that the objection should go to the credit than to the competency of the witness.

Rule absolute.

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BELL v. BILTON.

May 6.

COVENANT by the grantee against the surety of the grantor of an annuity, for two quarters of the annuity, due *October 29. 1826.* The annuity deed bore date *January 1822*; the grantor became a bankrupt in 1823, and passed his last examination in *September* that year, since which time no meeting was held under the commission, nor any dividend paid. The Defendant pleaded the bankruptcy of the grantor, and that the Plaintiff ought to have proved the annuity under his commission. The Plaintiff replied that he could not, and ought not to have proved.

Before suing the surety of the grantor of an annuity in respect of arrears of the annuity, where the grantor has become bankrupt, the value of the annuity must be ascertained by the commissioners, although the annuity was granted, and the grantor became bankrupt previously to *September 1825.*

The Plaintiff not having proved, on the part of the Defendant it was objected, at the trial before *Best C. J., Middlesex* sittings after *Trinity* term, that previous to commencing this action, the Plaintiff ought to have called on the commissioners to ascertain the value of his annuity under the 6 G. 4. c. 16. ss. 54. and 55., by which it is enacted, "that any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof, as shall have been caused by the lapse of time since the grant thereof to the date of the commission:"

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"That it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity, and for the payment thereof; and if such surety, after such proof, pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity, subsequent to the bankruptcy, shall have become due,) pay the sum so proved as aforesaid, he may be sued for the accruing payments of such annuity, until such annuitant shall have paid or satisfied the amount so proved, with interest thereon, at the rate of 4 per cent per annum, from the time of notice of such proof, and of the amount thereof being given to such surety; and after such payment or satisfaction, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid to the amount so paid or satisfied as aforesaid by such surety; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant, or of such surety in respect of such annuity; provided that such surety shall be entitled to credit in account with such annuitant, for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid:"

A verdict, however, was taken for the Plaintiff, subject to the consideration of the above objection; and

Cross Serjt. having accordingly obtained a rule *nisi* to set aside this verdict and enter a nonsuit instead,

Bosanquet Serjt., who shewed cause, contended that the act, which was not to take effect till *September 1825*, could not be considered as retrospective with regard

regard to the practice of proving annuities under a commission; and that it would be a great hardship on the Plaintiff to hold otherwise; for there having been no meeting under the grantor's commission since 1823, the Plaintiff must, at his own expence, have called a meeting of the commissioners on purpose, if it were necessary for him to have his annuity valued before commencing this action. By the express language of the act, the old practice was not to be altered except where it was so declared, and there was no declaration of any retrospective alteration in the mode of proving annuities.

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Cross. The previous acts having been all repealed, the 6 G. 4. c. 16. was the only act in force when the Plaintiff commenced his action; he was bound, therefore, to observe the conditions imposed on him by that act.

Cur. adv. vult.

BEST C. J. This was an action of covenant brought against the surety of the grantor of an annuity, the grantor having become a bankrupt.

The annuity secured by the deed on which the action was brought, was 70*l.* per annum.

The Plaintiff seeks to recover 35*l.*, being for two quarters of the annuity which became due on the 29th *October* 1826. The annuity deed was of the date of the 29th *January* 1822. The commission of bankrupt, under which the grantor of the annuity was declared a bankrupt, issued in the year 1823. The bankrupt passed his last examination on the 6th *September* 1823. Since that time no meeting has been held under the commission. No dividend has been paid. The Plaintiff might have had a meeting of the commissioners called for the purpose of ascertaining the value of his annuity, and of proving under the commission for its

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value so ascertained, but he must have been at all the expense occasioned by the calling of such meeting.

The value of the annuity, at the time of the issuing the commission, has not been ascertained by the commissioners, or proved by the Plaintiff under the commission.

It was objected at the trial, that, although at the time the annuity was granted, there was no law that compelled the Plaintiff to ascertain the value of his annuity at the date of the commission, and to prove for such value, before the grantee brought any action against the surety of the grantor, yet as the arrears sought to be recovered became due since the 6 G. 4., no action could be brought to recover them until after a valuation of the annuity and proof of the ascertained value under the commission, and delay on the part of the surety in paying the sum so proved.

I confess that I have had considerable difficulty in making up my mind, whether the legislature could mean to affect annuities granted before the passing the late act; but although I cannot satisfy myself that the principle of the act is just, I think, on reflection, that the legislature did intend that the clauses should apply to annuities granted before the passing the 6 G. 4., and being satisfied of that, we are bound to give it this effect whatever may be the consequence. In the first place, the object of the legislature was completely to relieve bankrupts from all future demands on account of annuities granted by them. To do this, the act must be made to embrace such as were granted before, as well as those granted since it was passed. Again, where the legislature intended that the statute should not affect commissions previously issued, that intention is declared in express terms: such terms will be found in the 57th, 96th, and 98th sections. The introduction of such words into those sections furnishes a strong argument to prove that the other sections, containing words capable of bearing a retrospective construction, should receive that

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construction. The Plaintiff not having pursued the course pointed out by 6 G. 4., the Court think that this action cannot be maintained; therefore the rule for a nonsuit must be made

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Absolute.

ALLISON v. HAYDON.

May 7.

ASSUMPSIT for work and labour as a surgeon and apothecary, with counts for medicines sold and delivered. At the trial before *Burrough J., Middlesex* sittings after *Hilary* term last, it appearing that the Plaintiff had a certificate from the College of Surgeons, but none from the master and warden of the Apothecaries' Company, the Defendant disputed certain charges for attending him in a typhus fever; and it was objected that he could not recover for these attendances, the 55 G. 3. c. 194. s. 21. having enacted, that "no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial that he was in practice prior to or on the first of *August* 1815, or that he has obtained a certificate from the court of examiners" by the said act constituted. The learned Judge was of this opinion, and the Plaintiff was nonsuited.

A person having a certificate from the College of Surgeons cannot charge for attending a patient in a fever, unless he have also a certificate from the Apothecaries' Company.

Taddy Serjt. obtained a rule *nisi* for a new trial, on the ground, that under this statute the privilege of the College of Surgeons enabled the Plaintiff to charge for medical attendance, sect. 29. having enacted, that the act shall not lessen, prejudice, or defeat the rights, authorities, privileges, and immunities vested in, and exercised, and enjoyed by either of the two Universities of *Oxford* and *Cambridge*, the Royal College of Physi-

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cians, the Royal College of Surgeons, or the said Company of Apothecaries, except such as have been altered, varied, or amended by the act, or of any person or persons practising as an apothecary previously to the said first of *August*, but the said universities, colleges, and persons shall have, &c. such rights, &c. save and except as aforesaid, in as beneficial a manner as they might have had if the act had not been passed.

E. Lawes Serjt., who shewed cause, relied on the express prohibitive language of the statute: "No apothecary shall recover *any* charges unless he shall prove that he has obtained a certificate."

Taddy. The object of the statute was to prevent illiterate persons from practising as apothecaries, and to obtain a class of persons duly qualified for the purpose. But a person who has the qualifications to practise as a surgeon, is better able to give medical advice than an apothecary, who stands in a lower grade of the profession; and the exception of the privileges of the Colleges of Surgeons and Physicians was introduced to enable surgeons to practise as they had done before the passing of the act; and it was always the custom for such persons to dispense their own medicines and give medical advice. A surgeon would esteem it *infra dignitatem* to be examined by the Apothecaries' Company, or to have a certificate that he was qualified to practise as an apothecary.

BEST C.J. I think this is a useful law intended to put apothecaries upon a more respectable footing, and to exclude low and ignorant persons from the practice of medicine. But the words of the act prevent all persons from recovering for attendance, except such as have duly qualified themselves as apothecaries. Sect. 21. is expressly to this effect: "No apothecary shall be allowed

allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial he was in practice prior to or on the 1st of *August* 1815, or that he has obtained a certificate from the said court of examiners."

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No one, therefore, can recover unless he were practising as an apothecary before 1815, or has a certificate from the court of examiners of the master and warden of the Apothecaries' Company. If, indeed, the Plaintiff had been practising as a surgeon, and had administered medicine as ancillary to a surgical case, his claim could not have been resisted; but he was lowering a typhus fever, which is the province of the physician or apothecary.

It has been argued, that he is protected by the superior privileges of the College of Surgeons. I think not. The College of Physicians is equally mentioned in the act, but surely if a physician were to dispense his own medicines, he could not be entitled to recover.

The act does not give the College of Surgeons any new privileges, but merely preserves the old. A surgeon formerly was a mere operator, who joined his practice to that of a barber. In latter times all that has been changed, and the profession has risen into great and deserved eminence. But the business of a surgeon is, properly speaking, with external ailments and injuries of the limbs. With a view to the recovery of a patient in a case of that description, he may, perhaps, prescribe and dispense medicine. But the act has drawn the distinction between the various departments of the art with great precision. A chymist may prepare and vend, but not prescribe or administer medicine. Each is protected in his own branch, and neither must interfere with the province of the other. We think the Plaintiff has interfered with the province of the apothecary, and that, therefore, this rule must be discharged.

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PARK J. The object of the act was to keep the business of apothecary distinct from the other branches of the profession: the title is, "An act for better regulating the practice of apothecaries throughout *England* and *Wales*;" and by s. 14. it is enacted, "that it shall not be lawful for any person, except persons then in practice, to practise as an apothecary, unless he shall have been examined by the court of examiners by the said act constituted, or the major part of them, and have received a certificate of his being duly qualified to practise as such from the court of examiners." So that a person cannot obtain the certificate unless upon examination he appear duly qualified. The privileges of the three other branches of the profession, those of physicians, surgeons, and chemists are preserved. But a chemist can only recover for medicines sold, not for advice or attendance; and a surgeon cannot charge for his attendance, or for administering medicine, except in cases within his own department.

BURROUGH J. concurred.

GASELEE J. By the act a distinction is made between the province of apothecary and assistant to an apothecary, and persons are not allowed to act even as assistants, unless duly qualified. Where persons act as surgeons and apothecaries, I believe they are examined both by the College of Surgeons, and the master and warden of the Apothecaries' Company, particularly in the navy, where it is necessary for them to act in both capacities; and they receive a certificate according to the rate of the ship in which they serve.

I think the Plaintiff cannot recover for his attendance in the present instance; and that, therefore, the rule must be

Discharged.

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LEDBETTER, Assignee of HOLLIS, v. SALT.

May 8.

THE Defendant, in *June* 1825, with a view to suing out a commission of bankrupt against *Hollis*, made an affidavit that *James Hollis*, of *Bishop Stoke*, miller, dealer, and chapman, was justly indebted to the Defendant in the sum of 100*l.* and upwards, for goods sold, and that *James Hollis* was become bankrupt within the true intent and meaning of the statute, and that the commission, when obtained, was intended to be executed at *Southampton*. Upon this affidavit a commission was issued; but the Defendant having, after the commission was issued, clandestinely obtained certain flour of *Hollis's*, sufficient to satisfy his own debt, applied it to the discharge of that debt, and proceeded no further with his commission, which was subsequently superseded.

Affidavit that a party is indebted to deponent in the sum of 100*l.* and upwards, and is become bankrupt, is, as against deponent, conclusive evidence of the bankruptcy.

A second commission was afterwards sued out on the act of bankruptcy committed by *Hollis*, in thus delivering goods to the Defendant, whereby he might obtain more in the pound than the other creditors, the statute 5 G. 2. c. 30. s. 24. having enacted as follows: "And whereas commissions of bankrupts are frequently taken out by persons who by means of such commissions (on a composition proposed by the bankrupts), and on promise not to execute the same, prevail with, and extort from the bankrupts their whole debts, or much greater part thereof than such bankrupts pay to their creditors; or otherwise get from such bankrupts goods or other real or personal security, which is contrary to the true intent and meaning of the several statutes made concerning bankrupts, which said statutes intend that all such bankrupts' creditors shall be on an equal foot, and not one preferred before another, or paid more than another in respect of his or her debt;

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be it therefore enacted by the authority aforesaid, that if any bankrupt or bankrupts shall after issuing of any commission against him, her, or them, pay to the person or persons who sued out the same, or otherwise give or deliver to such person or persons goods or any other satisfaction or security for his, her, or their debt, whereby such person or persons suing out such commission shall privately have and receive more in the pound in respect of his, her, or their debt, than the other creditors, such payment of money, delivery of goods, or giving greater or other security or satisfaction, shall be deemed and taken to be an act of bankruptcy, whereby on good proof thereof such commission shall and may be superseded."

The Plaintiff, as assignee under this second commission, sued the Defendant in trover for the flour obtained by him as before-mentioned.

Upon the trial of this cause before *Best* C. J., last *Winchester* Summer assizes, the bankruptcy having been disputed, the Plaintiffs proved the supersedeas of the former commission, the Defendant's affidavit on which that commission had been obtained, and the clandestine delivery of the flour to him.

This was objected to as insufficient; a verdict, however, was found for the Plaintiffs; the consideration of the objection being reserved for the Court. But *Best* C. J. held that the Defendant was by his affidavit estopped to say there had been no previous bankruptcy.

E. Iawes Serjt. moved for a new trial, on the ground that in order to support a commission founded on an act of bankruptcy committed by a delivery of goods to one creditor in preference to the rest, the statute 5 G. 2. c. 30. s. 24. required that a commission should have actually been sued out against the party delivering the goods previous to the delivery, and that he should be actually a bankrupt; that no evidence had been given
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of such a commission but the Defendant's affidavit, which, instead of shewing that a commission had actually been sued, merely intimated an intention that it should be sued out; that the supersedeas was no evidence that *Hollis* was a bankrupt when he delivered the goods, for, peradventure, when he delivered the goods the petitioning creditor's debt might have been discharged; and, besides, the commission itself was the best evidence, and ought to have been produced: before it could be shewn to have been superseded it must be shewn to have existed. In *Ex parte Brown* (a) and *Ex parte Paxton* (b), Lord *Eldon* doubted whether the giving security or satisfaction to a creditor after a docket struck were an act of bankruptcy, unless it were given after a commission also actually sued out. So likewise in *Wydown's* case (c); and the affidavit, though perhaps evidence of a docket, was no evidence of a commission.

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A rule *nisi* having been granted,

Wilde Serjt. shewed cause. By the 5 G. 4. c. 98., which was in force at the time of this action; a compromise after striking a docket is a sufficient act of bankruptcy. But a supersedeas reciting that a commission issued on a certain day, is evidence of the commission having issued on that day. And *Gervis v. Western Canal Company* (d), and *Harmar v. Davis* (e), decide that one who has made an affidavit as a petitioning creditor is estopped to dispute the bankruptcy of the party against whom he has made the affidavit.

Lawes having replied,

BEST C. J. said, I should have had no doubt if the point had rested only on the statute of 5 G. 2. But

(a) 15 Ves. 475.

(b) 15 Ves. 462.

(c) 14 Ves. 88.

(d) 5 M. & S. 76.

(e) 7 Taunt. 300.

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the statute of 5 G. 4. is somewhat different, and less favourable for the objection raised on the part of the Defendant. (After stating the facts as above, his Lordship proceeded):

At the trial the supersedeas of the former commission was put in; and if there were any doubt whether that would be sufficient proof of the former commission, that doubt must be set at rest by *Gervis v. Western Canal Company*. But, admitting it to be necessary that the petitioning creditor's debt, the trading, and the act of bankruptcy under that commission should be shewn, the question arises, whether the Defendant is not estopped by his own affidavit from disputing those matters.

The doubts supposed to have been expressed on the subject by Lord *Eldon* induced me to reserve the point. But in the cases in 14 & 15 *Vesey* this was not the point he was called on to decide; and he only decided, in effect, that under the stat. 5 G. 2. the striking a docket for a concerted commission was not a sufficient act of bankruptcy to support a subsequent commission, but that for that purpose a commission must also have been sued out. But the point was settled in *Harmer v. Davis*. There the assignees of a bankrupt having sued the petitioning creditor for money of the bankrupt's, and having accidentally disclosed on a statement of accounts between the Defendant and the bankrupt, that the balance due from the latter was not sufficient to support the commission, it was held, nevertheless, that the Defendant, by his affidavit of debt in support of the commission, was estopped from taking advantage of that fact to defeat the action.

The provision in the statute, indeed, would be of no use if under the second commission it were necessary to prove again, against the parties implicated, all that they have admitted under the first. Lord *Eldon* says (a),

(a) 15 *Ves.* 463.

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“The statute, not merely prohibiting the transaction, but making it an act of bankruptcy, proceeds upon this reason, that if the creditor, who has taken out a commission, stops before the bankruptcy is declared, though the proof that an act of bankruptcy was committed may be in his power, it may not be within the reach of any other creditor; therefore that act is made itself an act of bankruptcy; upon which, without further proof, another commission may be taken out. It is not, however, necessary to decide upon the argument, whether this clause of the statute means a person actually a bankrupt, or so treated by those who take out the commission; as, upon the evidence, the bankruptcy is established clearly, and without contradiction.” The Courts have said, that they who have treated the party as a bankrupt shall not afterwards gainsay their own assertions; and we do not decide against any deliberate judgment of Lord *Eldon*’s, the language referred to being only expressive of doubts on a question which was not the point in the cause.

PARK J. The only question is, whether the Defendant is not estopped to say there was no prior commission, when he himself was the person who set that proceeding in motion. The point, however, has been decided in *Harmar v. Davis*, where, although it appeared upon a balance of accounts between the petitioning creditor and the bankrupt, that the balance due from the bankrupt was not sufficient to constitute a petitioning creditor’s debt, yet the petitioning creditor was holden to be by his affidavit estopped to take advantage of that fact.

In this case the petitioning creditor has done that, and he cannot dispute his own proceeding. Lord *Eldon*’s doubts do not impeach the decision in *Harmar v. Davis*, for he came to no conclusion on the point.

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BURROUGH J. concurred.

GASELEE J. The argument for the Defendant is founded on a misapprehension of the use made of the affidavit of the petitioning creditor under the first commission. That affidavit is not sufficient to issue a second commission on; but, as against the petitioning creditor, it is sufficient to shew the existence of the proceedings set on foot by him. Upon that affidavit of his the previous commission issued; under that the party was made a bankrupt; and the Defendant having put him in a condition to commit the offence which the parol evidence in the cause shews him to have afterwards completed, cannot be permitted to turn round and say that he was not a bankrupt under the first commission. The case of *Harmar v. Davis* is conclusive on the point, and the rule must be

Discharged.

May 9.

WILLIAM BIRD, an Infant, by J. BIRD, his next Friend, v. HOLBROOK.

The Defendant, for the protection of his property, some of which had been stolen, set a spring gun, without notice, in a walled garden, at a distance from his house: the

THIS was an action upon the case. The first count of the declaration alleged that the Defendant had placed in a certain garden of the Defendant a certain instrument called a *spring gun*, loaded with gunpowder and shot, with certain wires communicating with the lock of the said gun, by the treading upon which the gun could and might be let off; by means whereof the person against whom the same should be discharged, might and could be much hurt, maimed, and wounded; Plaintiff, who climbed over the wall in pursuit of a stray fowl, having been shot,—Held, that the Defendant was liable in damages.

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and thereupon it became the duty of the Defendant, after he had so placed the said gun, not to have suffered it to remain so loaded without giving notice or warning, to prevent persons having occasion to enter into the said garden, from treading upon the wire, in ignorance that the same was so set, and thereby letting off the gun and being injured by the discharge thereof. Yet the Defendant, not regarding his duty in that behalf, wrongfully, wilfully, and negligently suffered the gun to remain in his garden so loaded and set, without giving any such notice or warning whatever; by means whereof the Plaintiff, having occasion to enter into the garden, and not having any notice, warning, or knowledge, or any means of knowledge that any spring gun was set in the garden, trod upon the wire attached to the lock of the gun, by means whereof it was let off and discharged, and the shot discharged therefrom were driven against the Plaintiff, and one of his legs was maimed, and the Plaintiff was otherwise injured, and became disordered, and so continued for a long time, by means whereof he suffered great pain, and expended a large sum of money in his cure.

The second count alleged, it was a duty of the Defendant not to allow the spring gun to remain loaded in the day-time without notice, to prevent persons from treading upon the wire from ignorance that it was set.

The third count described the spring gun as a certain dangerous engine, made for the purpose and with the intent to lacerate, maim, and wound persons, and alleged it was the duty of the Defendant not to suffer the spring gun to remain in the garden without using due and proper and reasonable means or care to prevent such persons as might enter into or be in the garden, from ignorantly and unwittingly treading upon the wire communicating with the lock of the gun; and that the Defendant did not take due and proper and reasonable
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care to prevent persons who might enter into or be in the garden, from ignorantly and unwittingly treading upon the wire of the gun, and thereby causing it to be let off. That Defendant neglected and wholly refused so to do, and on the contrary, contriving and intending to injure the Plaintiff, wrongfully and injuriously permitted the gun to remain so loaded and set with a wire, by means of which it might be let off and discharged without any notice or warning, by means whereof the Plaintiff not being able to perceive a certain concealed wire, and not having any notice or knowledge, or means of notice or knowledge thereof, trod upon the said last mentioned wire, and the gun was thereby let off. *Per quod, &c.*

The fourth count charged the Defendant with having set upon certain other ground of the Defendant a spring gun, made with intent to lacerate, maim, and wound persons, being then and there loaded with gunpowder and shot, and set with concealed wires; and thereupon it became the duty of Defendant not to permit the gun to remain on the ground without taking due, proper, and reasonable means and care to prevent any person from ignorantly and unwittingly treading upon the wire, and causing it to be let off.

The fifth count charged that the wires were concealed and imperceptible, and that the Defendant had taken no means or precaution whatever to prevent persons from treading on them through ignorance that they were so set; and Defendant wrongfully permitted the Plaintiff in entering into and proceeding in the said last-mentioned ground, to tread upon the said wire so concealed and imperceptible, and unknown to the Plaintiff.

The sixth charged the Defendant with setting a gun upon certain other land of the Defendant, and alleged the breach of duty, in having taken no means or precaution whatever to prevent persons from treading on
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the wire, and wrongfully and injuriously permitted the Plaintiff, in entering into and proceeding in the said last-mentioned garden, to tread upon the wire.

The cause was tried at the *Bristol* assizes, 1825, when a verdict was taken for the Plaintiff, by consent, damages 50*l.*, subject to a case reserved, with liberty to either party to turn it into a special verdict. The following were the facts of the case:—

Before, and at the time of the Plaintiff's sustaining the injury complained of, the Defendant rented and occupied a walled garden in the parish of *St. Phillip and Jacob*, in the county of *Gloucester*, in which the Defendant grew valuable flower-roots, and particularly tulips, of the choicest and most expensive description. The garden was at the distance of near a mile from the Defendant's dwelling-house, and above one hundred yards from the road. In it there was a summer-house, consisting of a single room, in which the Defendant and his wife had some considerable time before slept, and intended in a few days after the accident again to have slept, for the greater protection of their property. The garden was surrounded by a wall, by which it was separated on the south from a footway up to some houses, on the east and west from other gardens, and on the north from a field which had no path through it, and was itself fenced against the highway, at a considerable distance from the garden, by a wall. On the north side of the garden the wall adjoining the field was seven or eight feet high. The other walls were somewhat lower. The garden was entered by a door in the wall. The Defendant had been, shortly before the accident, robbed of flowers and roots from his garden to the value of 20*l.* and upwards: in consequence of which, for the protection of his property, with the assistance of another man, he placed in the garden a spring gun, the wires connected with which were made to pass from the door-way of the summer-

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house to some tulip beds, at the height of about fifteen inches from the ground, and across three or four of the garden paths, which wires were visible from all parts of the garden or the garden wall; but it was admitted by the Defendant, that the Plaintiff had not seen them, and that he had no notice of the spring gun and the wires being there; and that the Plaintiff had gone into the garden for an innocent purpose, to get back a pea-fowl that had strayed.

A witness to whom the Defendant mentioned the fact of his having been robbed, and of having set a spring gun, proved that he had asked the Defendant if he had put up a notice of such gun being set, to which the Defendant answered, that "he did not conceive that there was any law to oblige him to do so," and the Defendant desired such person not to mention to any one that the gun was set, "lest the villain should not be detected." The Defendant stated to the same person that the garden was very secure, and that he and his wife were going to sleep in the summer-house in a few days.

No notice was given of the spring gun being placed in the garden, and before the accident in question occurred, another person to whom the Defendant mentioned the fact of his garden having been robbed of roots to the value of 20*l.*, and to whom he stated his intention of setting a spring gun, proved that he had told the Defendant that he considered it proper that a board should be put up.

On the 21st *March* 1825, between the hours of six and seven in the afternoon, it being then light, a pea-hen belonging to the occupier of a house in the neighbourhood had escaped, and, after flying across the field above mentioned, alighted in the Defendant's garden. A female servant of the owner of the bird was in pursuit of it, and the Plaintiff (a youth of the age of nineteen years),

years), seeing her in distress from the fear of losing the bird, said he would go after it for her: he accordingly got upon the wall at the back of the garden, next to the field, and having called out two or three times to ascertain whether any person was in the garden, and waiting a short space of time without receiving any answer, jumped down into the garden.

The bird took shelter near the summer-house, and the boy's foot coming in contact with one of the wires, close to the spot where the gun was set, it was thereby discharged, and a great part of its contents, consisting of large swan shot, were lodged in and about his knee-joint, and caused a severe wound.

The question for the opinion of the Court was, Whether the Plaintiff was entitled to recover: if so, the verdict was to stand; otherwise a nonsuit was to be entered.

Wilde Serjt. for the Plaintiff.

The Defendant is liable in damages for the injury the Plaintiff has sustained.

For the protection of property, no man has a right to resort to violence greater than the occasion requires. The law does not allow the apprehension of a mere trespasser, much less the infliction of wounds or death. The authorities on the point are numerous and clear, and the form of pleading a justification of force in defence of property, always alleges, that no more damage was done than was necessary for the purpose to be effected. Lord *Coke*, taking the distinction between defence of the person and defence of possession, or goods, says, (2 *Inst.* 316.) " There is also another diversity between an appeal of mayhem or an action of trespass for wounding or mannas of life and member, and an action of trespass for assault and battery for a man in defence or for the preservation of his possession of lands or goods: for in that case he may justify an

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assault and battery: but he cannot justify either mayhem, or wounding, or mannanas of life and member; and so note a diversity between the *defence of his person* and the defence of *his possession or goods*."

In *East's Pleas of the Crown*, (vol. i. 273.) it is laid down, that to justify wounding or killing, "There must be felony intended; for if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him so far as to make him desist, yet if he kill him, it is manslaughter. But if the other had come to rob him, or take his goods *as a felon*, and were killed in the attempt, it would be justifiable in self-defence." Again, p. 288. "But where the trespass is barely against the property of another, the law does not admit the force of the provocation sufficient to warrant the owner in making use of any deadly or dangerous weapon; as if upon sight of one breaking his hedges, the owner take up a hedge-stake and knock him on the head, and kill him, this would be murder, because it was an act of violence much beyond the proportion of provocation; and still more, where such or the like violence is used after the party has desisted from the trespass; but if the beating were with an instrument, or in a manner not likely to kill, it would only amount to manslaughter; and it is even lawful to exert such force against a trespasser, who comes without any colour to take the goods of another, as is necessary to make him desist." *Regina v. Mawgridge*. (a)

In *Hale's Pleas of the Crown*, (473.) the same principle is laid down thus: "If *A.* comes into the wood of *B.* and pulls his hedges or cuts his wood, and *B.* beat him, whereof he dies, this is manslaughter, because though it was not lawful for *A.* to cut the wood, it was

(a) *Kelynge*, 132.

not lawful for *B.* to beat him, but either to bring him to a justice of peace, or punish him otherwise, according to law." And again, p. 486., "Now, concerning felonies, as there is a difference between them and trespasses, so there is a difference among themselves in relation to the point *se defendendo*. If a man comes to take my goods as a trespasser, I may justify the beating of him in defence of my goods, but if I kill him, it is manslaughter: but if a man comes to rob me, or take my goods as a felon, and in my resistance of the attempt I kill him, it is *me defendendo* at least, and in some cases not so much."

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And not only is it unlawful for a party to have recourse to wounding or killing in defence of property, where no felony is attempted; it is even a high offence for one who knows of the existence of a mortal peril, to suffer another to approach it without giving him warning; and, on this principle, however they differed on other points, the Judges in *Deane v. Clayton (a)* all agreed, that it could not be allowable, without notice, to expose even a trespasser to a mortal injury; an opinion confirmed by the language of the whole Court in *Ilott v. Wilks. (b)*

But if, for the protection of property or in defence of possession, it be unlawful to have recourse to desperate violence, it is still less excusable to resort to such violence after the trespass has been committed. Prevention, not punishment, is the foundation of the right. The means lawfully taken to prevent offences, may, and frequently do, operate as punishments: but they are justifiable only in their quality of preventives; and, even then, the degree of force must, in no case, be greater than is necessary to effect the object; and with respect to all the graver degrees of violence, they must not exceed

(a) 9 Taunt. 518.

(b) 3 B. & A. 308.

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the measure of punishment which the law would have inflicted if the offence had been perpetrated.

But the infliction of injuries, however slight, which only operate by way of example, cannot be justified. The sanction of law is requisite to give effect to punishment, and pain inflicted for a supposed offence, at the discretion of an individual, without the intervention of a judicial sentence, is a mere act of revenge; it can never have the quality of judicial infliction to prevent similar offences, since it cannot be known whether it has been justly or unjustly resorted to. In this respect the present case is distinguished from all that have preceded it; not only was no notice afforded to the Plaintiff of the danger he incurred, but it is manifest, from the declarations of the Defendant, that notice was withheld, not for the purpose of preventing a trespass, but of inflicting a serious injury after the trespass should have been committed. The Defendant carefully abstained from using the spring gun, as a means of prevention by warning, in order to insure a victim, to hold up to the public as an example.

But it being clear from the foregoing authorities, that such conduct would have been illegal, if the Defendant had been present, and had seen the Plaintiff enter his garden, the absence of the Defendant at the time of the injury makes no difference in the case; more especially where his own declarations have shewn so unequivocally what were his intentions in case he had been present. No man is permitted to do indirectly that which it is unlawful for him to do directly. The Plaintiff was not attacking the Defendant's person, he was not attempting any felony; at the utmost, he was a bare trespasser: the Defendant, if he had been present, could not have apprehended, much less have shot him for the trespass. But, having placed a gun with the declared intention of shooting him, it is no defence to say he was absent when the gun went off.

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Merewether Serjt. for the Defendant. The Defendant's declaration does not shew an intention to revenge or punish, rather than to prevent, but a desire to detect for the purposes of prevention; and his defence rests on two grounds: first, the right which every man has to take precautionary measures for the protection of his property during unavoidable absence; secondly, the principle which precludes a wrong-doer from recovering a compensation for an injury occasioned by his own wrong.

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Undoubtedly a man is not allowed to do indirectly what it would be unlawful for him to do directly; but the necessity of protecting property at a distance authorizes the proprietor to resort directly to means, during his absence, which it might be unlawful for him to employ if on the spot. The humanity or inhumanity of a practice, is not a test of its legality; and the law does not exact every line of conduct which benevolence or religion may recommend. It is admitted that a trespasser may be repelled by force, if no more force be employed than is necessary; but, during absence, a man can employ, for the protection of his property, no less and no other force than that of machines, which may repress offenders by the fear of pain or detection; and if they are so employed as not to molest another in the exercise of his rights, there is no violation of the maxim, "*Sic utere tuo ut alienum non lædas*," which applies to the active invasion of another's rights, and not to the quiet protection of our own. A party present, therefore, cannot justify the shooting a trespasser, because that is a greater degree of violence than the occasion requires; and knowing the trespasser, he should resort to the law, and not take the punishment into his own hands; yet he may well justify placing a gun during his absence, because, by no less degree of probable violence can he deter felons and trespassers. Besides

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which, in placing the gun he is making a lawful use of his own property; a use in no degree affecting the rights of others, and for which he could not be indicted, while any one who removed the gun would be indictable for so doing. (*Per Bayley J. in Ilott v. Wilks.*) Then, if such be a lawful use of his own property, it cannot be required that he should give notice of doing a mere lawful act: and no case has decided that notice is necessary upon such an occasion. *Ilott v. Wilks* did not decide that the defendant was bound to give notice, but merely that the plaintiff, having received notice, had no ground of complaint. Here, however, the Plaintiff had ample notice in the circumstance that the wires of the gun were all visible.

In *Blithe v. Topham* (a), the proprietor of a waste had dug a pit, a few yards only from a highway: a horse having fallen into it, it was holden the owner could not recover damages.

The pit having been as fatal to the horse as a spring gun would have been, the case is in point, and much stronger than the present, there having been no notice at all, and no wall round the pit, as there was round the garden of the present Defendant, which in itself operated as notice.

But *Brock v. Copeland* (b) seems decisive; for the defendant in that case having placed a large dog for the protection of his yard, the plaintiff, not a trespasser, but the defendant's foreman, entering the premises by night, was bitten; and Lord *Kenyon* held that he could not recover damages.

No distinction can be drawn between a spring gun and a ferocious dog; and though the defendant would not have been justified in allowing him to be at large,

(a) 1 *Roll. Abr.* 88. *Cro. Jac.* 158.(b) 1 *Exp.* 203.

or, perhaps, in setting him on to attack a trespasser, yet it is plain he was authorized in chaining him up in the yard for the protection of property during his absence. In the case of the furious bull, referred to by *Kenyon C. J.* in *Brock v. Copeland*, there was a public footway over the field in which the bull was placed; so that the owner of the field, in placing the bull there, was making a use of it inconsistent with the rights of the public.

The main ground of the defence, however, is, that the Plaintiff cannot recover for an injury occasioned to him by his own wrongful act. *Commodum ex injuriâ non oritur*; and it is equally the principle of our law, that *jus ex injuriâ non oritur*. If a man place broken glass on a wall, or spikes behind a carriage, one who wilfully encounters them, and is wounded, even though it were by night, when he could have no notice, has no claim for compensation. *Volenti non fit injuria*. The Defendant lawfully places a gun on his own property; he leaves the wires visible; he builds a high wall, expressly to keep off intruders; and if, under those circumstances, they are permitted to recover for an injury resulting from their scaling the wall, no man can protect his property at a distance.

A clear proof of the legality of the practice, at the time this action commenced, is afforded by the passing of the recent act, against setting spring guns, except in houses and by night. That act is not declaratory, but prohibitory; and when a statute is prohibitory, it is a legislative admission that the act prohibited was not an offence before.

Wilde in reply. The statute is declaratory as to setting guns without notice, and prohibitory as to setting them, even with notice, except in the dwelling-house at night. In *Brock v. Copeland* the dog was placed for the protection of the dwelling-house, and the party attacked,

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attacked, being the defendant's foreman, knew that the dog was there; and in *Blithe v. Topham* the pit was not dug for the purpose of doing mischief, but in the necessary cultivation and enjoyment of the defendant's property. The maxim *volenti non fit injuria* has no application in the present case, as the Plaintiff had no notice of the penalty which he incurred; the notice being expressly withheld, lest it should deter persons from entering, *i. e.*, lest it should make them *unwilling* to subject themselves to the injury prepared for them.

No illustration can be drawn from the use of spikes and broken glass on walls, &c. These are mere preventives, obvious to the sight, — unless the trespasser *chooses* a time of darkness, when no notice could be available, — mere preventives, injurious only to the persevering and determined trespasser, who can calculate at the moment of incurring the danger the amount of suffering he is about to endure, and who will, consequently, desist from his enterprise whenever the anticipated advantage is outweighed by the pain which he must endure to obtain it.

BEST C. J. I am of opinion that this action is maintainable. If any thing which fell from me in *Ilott v. Wilks* were at variance with the opinion I now express, I should not hesitate to retract it; but the ground on which the judgment of the Court turned in that case, is decisive of the present; and I should not have laboured the point that the action was not maintainable in that case on the ground that the plaintiff had received notice, unless I had deemed it maintainable if no notice had been given. ABBOTT C. J. says: "Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these, where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained." BAYLEY J. says:

says: "This is a case in which the plaintiff had notice that there were spring guns in the wood." "The declaration assumes the law to be, not that the mere act of placing these guns in a man's own ground is illegal, and punishable by indictment, but that a party doing that act may be liable to an action, provided he does not take due and proper means, by giving notice, to prevent the injury which those engines are calculated to produce."

Holroyd J. says: "I am of opinion that this action is not maintainable, on the ground that the plaintiff had notice that the spring guns were placed in the wood in question." "So far as he was concerned, the cause of the mischief could not be considered as latent, and the act of letting off the gun, which was the consequence of his treading on the wire, must be considered wholly as his act, and not the act of the person who placed the gun there." And I am reported to have said, expressly, "Humanity requires that the fullest notice possible should be given, and the law of *England* will not sanction what is inconsistent with humanity."

It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of *England*. I am, therefore, clearly of opinion that he who sets spring guns, without giving notice, is guilty of an inhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer. But this case stands on grounds distinct from any that have preceded it. In general, spring guns have been set for the purpose of deterring; the Defendant placed his for the express purpose of doing injury; for, when called on to give notice, he said, "If I give notice, I shall not catch him." He intended, therefore, that the gun should be discharged, and that the

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the contents should be lodged in the body of his victim, for he could not be caught in any other way. On these principles the action is clearly maintainable, and particularly on the latter ground. The only thing which raised any doubt in my mind was the recent act of parliament; and if that had been purely prohibitory, there would be great weight in the argument which has been raised on it; because in a new prohibitory law we have the testimony of the legislature that there was no previous law against the thing prohibited. But the act is declaratory as to part, and prohibitory as to part; declaratory as to the setting of spring guns without notice, and the word "declared" is expressly introduced; prohibitory as to setting spring guns, even with notice, except in dwelling-houses by night. As to the case of *Brock v. Copeland*, Lord *Kenyon* proceeded on the ground that the defendant had a right to keep a dog for the preservation of his house, and the plaintiff, who was his foreman, knew where the dog was stationed. The case of the furious bull is altogether different; for if a man places such an animal where there is a public footpath, he interferes with the rights of the public. What would be the determination of the Court if the bull were placed in a field where there is no footpath, we need not now decide; but it may be observed, that he must be placed somewhere, and is kept, not for mischief, but to renew his species; while the gun in the present case was placed purely for mischief. The case of the pit dug on a common has been distinguished, on the ground that the owner had a right to do what he pleased with his own land, and the plaintiff could shew no right for the horse to be there.

Those cases, therefore, do not apply to one, where an instrument is placed solely for a bad purpose. In *Deane v. Clayton*, I incline to the opinion expressed by
my

my brothers *Park* and *Burrough*. But in *Deane v. Clayton*, the plaintiff, the master of the dog, had a right to hunt in the wood adjoining that in which the dog was spiked; there was no visible boundary between the two woods; the manner in which the plaintiff and defendant occupied their respective properties was evidence of an understanding between them that the enjoyment should be mutual; and the dog was impelled onwards by his natural instinct in pursuit of the game. Looking at the authorities, therefore, *Deane v. Clayton* is out of the question; and *Ilott v. Wilks* is an authority in point. But we want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of *English* law to uphold humanity, and the sanctions of religion. It would be, indeed, a subject of regret, if a party were not liable in damages, who, instead of giving notice of the employment of a destructive engine, or removing it, at least, during the day, expressed a resolution to withhold notice, lest, by affording it, he should fail to entrap his victim.

PARK J. I adhere to the judgment I gave in *Deane v. Clayton*, but shall confine myself at present to the facts before the Court. Whether the recent act of parliament be altogether a new law, or only declaratory of the old, I abstain from deciding; certainly, as far as it makes the setting spring guns with notice an offence, it seems to be a new law; but, in the present case, I found my decision on the circumstance of the Defendant having omitted to give notice of what he had done, and his even expressing a desire to conceal it. In *Ilott v. Wilks*, the whole Court proceeded on the ground that the Plaintiff had had notice: and in *Deane v. Clayton* there

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there was notice, but under the circumstances it could not be said to have been brought home to the trespasser. It has been contended, that though notice may deprive a party who has received it of any right to recover, yet that it has nowhere been decided that it is imperative on the party using the engine to give notice. But in *Ilott v. Wilks*, the Court, one and all, decide on the ground of notice, and *Abbott C. J.* closes his judgment thus: "Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these, where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained." It has been asked, where has it been laid down that notice must be given? I answer, by *Abbott C. J.* in the passage I have just read; and by *Bayley J.* in the same case; "Although it may be lawful to put those instruments on a man's own ground, yet, as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent), it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger." One case precisely in point has not been adverted to; it is that of *Jay v. Whitfield (a)*. There the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring gun, for which injury he recovered 120*l.* damages at the *Warwick Summer assizes 1807*, before *Richards C. B.*, and no attempt was made to disturb the verdict.

BURROUGH J. The common understanding of mankind shews, that notice ought to be given when these means of protection are resorted to; and it was formerly

(a) 3 *B. & A.* 308. in the argument in *Ilott v. Wilks*.

the practice upon such occasions to give public notice in market towns. But the present case is of a worse complexion than those which have preceded it; for if the Defendant had proposed merely to protect his property from thieves, he would have set the spring guns only by night. The Plaintiff was only a trespasser: if the Defendant had been present, he would not have been authorised even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly. I held that, in *Deane v. Clayton*. There, the defendant was owner and occupier of a wood adjoining a wood of Mr. *Townshend's*, and divided from it by a low bank and a shallow ditch, not being a sufficient fence to prevent dogs from passing from one wood into the other. There were public footpaths without fences through the Defendant's wood. The defendant, to preserve hares in his wood, and prevent them from being killed therein by dogs and foxes, kept iron spikes screwed and fastened into several trees in his wood, each spike having two sharp ends, and so placed that each end should point along the course of a hare-path, at such a height from the ground as to allow a hare to pass under them without injury, but to wound and kill a dog that might happen to run against one of the sharp ends. The defendant kept notices printed on boards placed at the outsides of the wood, that steel traps, spring guns, and dog spikes were set in the wood for vermin. But the plaintiff, with Mr. *Townshend's* permission, being out shooting in his wood with a valuable pointer, and a hare which was started being pursued by the dog over the bank and ditch, into the defendant's wood, the dog ran against one of the sharp spikes, and was killed, although plaintiff endeavoured to prevent him from entering the defendant's wood.

Here, no notice whatever was given, but the Defendant
artfully

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artfully abstained from giving it, and he must take the consequence.

GASELEE J. After the decision in *Nott v. Wilks*, it is impossible to say that this action is not maintainable.

Judgment for the Plaintiff.

May 10.

HARRIS and Another v. BEAVAN.

The assignee of the reversion suing Defendant in covenant, alleged that the lessor was seised (without stating of what estate), and being so seised, devised to Plaintiff in fee.

After verdict: Held, a sufficient allegation of title.

THE declaration stated, that *Charles Bartholomew* being seised of one undivided moiety of certain tenements, by an indenture of 1784 between *Charles Bartholomew* of the first part, *Archdall Harris* of the second, *Eleanor Harris* of the third, and *John Paggett* of the fourth, they, *Charles*, *Archdall*, and *Eleanor*, demised the tenements to *John Paggett* for forty-five years, at the yearly rent of 40*l.*, yielding to the said *Charles*, in respect of the said moiety, 20*l.* yearly:—covenant by *John Paggett* with *Charles Bartholomew*, his heirs and assigns, to pay to him the rent of 20*l.* in respect of the said moiety: covenant with *Charles*, *Archdall*, *Eleanor*, and their heirs and assigns, to repair:—

That *Paggett* entered, and that afterwards his interest and term of years yet to come vested in the Defendant by assignment, and that Defendant entered.

That *Charles*, being so seised as aforesaid, in 1822 devised the demised premises of him, *Charles*, to the Plaintiffs and their heirs, and the same year died so seised of the reversion in the demised premises, whereby the Plaintiffs became seised of the said reversion in the said demised premises. That while the Plaintiffs were

so seised of the said reversion, 10l. became due from the Defendant for two quarters of the rent aforesaid. Breach, non-payment and non-repair.

A verdict having been found for the Plaintiffs at the *Middlesex* sittings after last *Michaelmas* term,

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Wilde Serjt. moved in arrest of judgment, that the declaration only stating that *Charles Bartholomew* was seised, without saying of what estate, it did not appear that he was seised of a sufficient estate to demise to *Paggett* for forty-five years, much less to devise to the Plaintiffs in fee. If his seisin were only for life, and it was nowhere averred to be in fee, he could do neither the one nor the other, so that the Plaintiffs had shewn no title which could authorise them to sue the Defendant.

A rule *nisi* having been granted,

Taddy Serjt. shewed cause. Where a word in a declaration is capable of two senses, and has not been put in issue, it shall, after verdict, be taken in the sense which will best support the pleadings: *Hobson v. Middleton*. (a) By finding for the Plaintiffs the jury have, in effect, found that *Charles Bartholomew's* seisin was a seisin in fee, and as the word *seisin* will cover such an interest, the finding is not inconsistent with the declaration. In *Rex v. Bishop of Llandaff* (b), it was held, that though in *quare impedit* it be necessary to allege a presentation, yet the want of such allegation may be cured by verdict; and the Court said, "If the true ground be, that it is only to shew *coment* he was seized, it is one of the least defects a verdict can cure; because the existence of the thing is admitted, and the doubt only upon the manner of it. An heir must shew *coment* heir, but if he does

(a) 6 B. & C. 302.

(b) 2 Str. 1012.

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not, and the other does not demur, the finding him heir will cure it."

Wilde. Though the verdict will cure a title defectively stated, it will not cure a defective title. In covenant by the assignee of the reversion, it is clear that the Plaintiff must trace a title from the original lessor. (1 *Wms. Saund.* 234 a. note 3.) But the Plaintiffs in the present case trace no title at all, for unless they allege *Charles Bartholomew* to have been seised in fee, they could not take by devise from him. Nothing can be inferred from this verdict but that *C. Bartholomew* was seised, which is not disputed, and which it would have been useless to traverse; but whether he was seised of such an estate as he could devise, was a matter of substance which the Plaintiffs were bound to allege, *Com. Dig. Pleader*, C. 36. *Carth.* 9. *Vin. Abr. Title*, D. 16. F. 1. *Carvick v. Blagrove* (a): it was traversable, and is found in all the precedents; *Bro. Abr. Pleadings*, 33. *Year-Book*, 24 Ed. 3. 75.

BEST C. J. The Plaintiff's title is very imperfectly stated, but it is sufficient after verdict. No doubt, when assignees of a reversion sue, they must deduce title from the original lessor. The Plaintiffs have done so: they allege that the original lessor was seised, and though there is ambiguity in the expression, it is cured by pleading over, and the finding of the jury.

GASELEE J. In the case from 11 *Modern Reports*, referred to in *Vin. Abr. Title*, D., *Willet v. Bescomb* (b), covenant was brought by an heir, for rent, against the assignee; but it was not set forth in the declaration that the ancestor was seised of any estate when he made the

(a) 1 B. & B. 536.

(b) 11 Mod. 179.

demise:

demise: the Court held that bad, because it did not appear that the ancestor had *any* estate; and *Seavage v. Hawkins* (a) being referred to, *Holt* C. J. said, "The case of *Seavage v. Hawkins* is well on issue joined, because it shews the father was seised." The case F. 1. does not appear to have been after verdict. The rule therefore must be

Discharged.

(a) *Cro. Car.* 571.

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RADBURN v. MORRIS and BOTTOMLEY.

May 12.

TROVER for a barge.

The Plaintiff claimed the barge under a purchase from *Buckman*. The Defendants, who were partners, claimed it under *Wilson*, who, it was alleged, had also purchased it of *Buckman*.

At the trial before *Burrough J.*, *London* sittings after *Michaelmas* term, *Buckman* was called as a witness to prove the Defendant's right to the barge, but was rejected, as having an interest in the cause. He was then released by *Wilson*, *Morris*, and his partner, jointly, by a release having only one stamp; by *Morris* and his partner, by a release signed by *Bottomley* only; and by *Wilson* severally; but it was held the releases did not restore his competency; and a verdict having been given for the Plaintiff,

B., called as a witness for the Defendant in an action brought by the Plaintiff for a barge which *W.* had placed in the hands of Defendant, and which, it was alleged, *B.* had sold to the Plaintiff first, and then to *W.*, was holden a competent witness for the Defendant, having been released by *W.*

Bompas Serjt. obtained a rule *nisi* for a new trial, on the ground that the witness had been improperly rejected.

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Wilde Serjt. shewed cause. The rejection was proper; *Buckman* had an interest in the result of the cause, and a greater interest in favour of the Defendants than in favour of the Plaintiff: for if the Plaintiff had succeeded, the Defendants would have been able to recover against *Wilson* the value of the barge, and the costs incurred in this action; and *Wilson* would have been entitled to recover both those sums in an action against *Buckman*, together with the costs of that action also, according to the principle established in *Adamson v. Jarvis* (a), where *A.*, an auctioneer, having sold goods under order of *B.*, who had no right to dispose of them, and the true owner having afterwards recovered the value against *A.*, it was held that he might recover over against *B.* But if the Defendants succeeded, *Buckman* would have been liable only to pay to the Plaintiff the value of the barge. The witness, therefore, did not stand indifferent between the parties; there was the difference of the costs in favour of the Defendants; and that has been holden sufficient to turn the scale: as in the instance of bail; *Piesley v. Von Esch* (b); or prochein amy; *James v. Hatfield*. (c) Then the releases never restored his competency. *Wilson* and the Defendants were distinct parties, and the release in which they joined ought at least to have had two stamps:—that by the Defendants was signed by *Bottomley* only, and he could not by deed bind his partner in respect of a tort upon which they were severally liable, and which was unconnected with the partnership concern; one of them could never have recovered contribution from the other in such a case, and therefore he could not release in his name:—that by *Wilson* alone, was useless, for he had no certain interest to release: it was not, then,

(a) 4 Bingham 66.

(b) 2 Esp. N. P. C. 606.

(c) 1 Str. 548.

certain

certain whether he would ever have to sue *Buckman* or not.

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Bompas. The witness ought not to have been rejected; his interest, if any, being too remote. The interest, to have excluded him, ought to have arisen directly out of the cause. But the Defendants if they had failed could never have sued *him*, they could only have sued *Wilson*; and the inconvenience would be great if the excluding interest were not confined to an interest in the cause in hand: no line could be drawn: and the possibility of exposure to an action, after many others should have been tried in succession, would render it necessary to procure a multitude of releases, which would render justice unattainable. But the rule has always been confined to an interest in the particular cause. In *Carter v. Pearce* (a) the Court said, "In order to shew a witness interested, it is necessary to prove that he must derive a *certain* benefit from the determination of the cause one way or the other." And in *Abrahams v. Bunn* (b) it is laid down, that where the interest is doubtful, the objection must go to the credit rather than the competency of the witness. The verdict, too, in this cause would never have been evidence against *Buckman*; for in an action between *Wilson* and *Buckman* it would have been *res inter alios gesta*, and the Defendants could only sue *Wilson*, not *Buckman*. He being competent, the releases were unnecessary.

BEST C.J. I am clearly of opinion that the Defendants could not sue *Buckman*: any action they could have maintained in case the Plaintiff had recovered, must have been brought against *Wilson*, under whom

(a) 1 T. R. 164.

(b) 4 Burr. 2254.

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they claimed; if so, no release was necessary from them to *Buckman*. I doubt whether a release were necessary even from *Wilson*; because, if so, it would be necessary in many cases for a hundred persons to release in succession; and it is better that objections to the competency of a witness on the score of interest should be confined to his interest in the immediate cause. But if it were necessary for *Wilson* to release, I am of opinion that he has sufficiently done so. Where at the time the instrument is executed the transaction has occurred out of which the future action, if any, is to arise against the witness, there is no reason why a party should not bar himself with respect to that transaction, though it might be otherwise with respect to causes of action which had not arisen at the time the release was executed.

PARK J. I confine my opinion to the last point: the witness was, at all events, rendered competent by the release from *Wilson*. *Morris* and his partner could never have sued the witness, and *Wilson*, who might perhaps have been placed in a situation to sue him, has effectually released every claim to arise out of the transaction in dispute.

BURROUGH J. declined to deliver any opinion.

GASELEE J. The Defendants could not sue *Buckman*, and therefore it is unnecessary to say whether the first release were valid or not, though I am inclined to think it was, because it related to a transaction in which the three releasors were all concerned. But as an action could only have been maintained against *Buckman* by *Wilson*, his release is sufficient.

Rule absolute.

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ROUTLEDGE v. GRANT.

May 13.

ASSUMPSIT. The declaration stated (first count) that the Plaintiff was possessed of a term in a dwelling-house, to expire 25th *December* 1856; and that Defendant agreed, on the 29th *April* 1825, upon receiving a lease for twenty-one years, at 250*l.* a year rent, with the option of having the time extended to thirty-one years, on giving six months' notice, and, upon having possession on the 25th *July* then next, to pay Plaintiff 2750*l.*, and take the fixtures at a valuation.

Averment of Plaintiff's readiness to grant the lease. Breach; refusal to accept it, and to take the fixtures at a valuation; and non-payment of the 2750*l.*

The second count alleged the Plaintiff to be entitled to a certain term, to wit, a term of thirty-two years, in the dwelling-house, under a certain contract between the Plaintiff and *Anthony Hermon*, who was authorized in that behalf; and then stated the agreement with the Defendant, and the breach, as before.

The third count alleged Plaintiff to be possessed for the residue of a certain term, to expire 25th *December* 1856; and the agreement, tender of lease to Defendant, and breach, as before.

At the trial before *Best C. J.*, *London* sittings after *Michaelmas* term, it appeared, that on the 18th *March*

twelve years' term in the premises, and shewing no written contract with *H.* for a term of thirty-two years, Held, a material variance.

3. Defendant offered to purchase a house upon certain terms, "possession to be given on or before 25th *July*;" Plaintiff agreed to the terms, and said he would give possession on the 1st of *August*, Held, no acceptance of Defendant's offer.

1. Defendant having offered to purchase a house, and to give Plaintiff six weeks for a definitive answer, Held, that before the offer was accepted, the Defendant might retract it at any time during the six weeks.

2. Averment, that Plaintiff was entitled to a term of thirty-two years in the premises, under a contract with *A.*, and that Plaintiff having agreed to take the premises, Defendant was ready to grant him a lease of thirty-one years: Plaintiff having only

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1825, the Plaintiff received a note from the Defendant touching the premises, in these terms:—

“ Mr. *Grant's* proposal.

“ To pay a premium of 2750*l.*, upon receiving a lease for twenty-one years, with the option (upon giving six months' previous notice to the landlord or his agent) of having the time extended to thirty-one years, paying the same yearly rent as before, for such extended term of ten years beyond twenty-one years.

“ Rent, 250*l.*

“ Mr. *Grant* to pay for the fixtures at a valuation, possession to be given on or before 25th *July* next, to which time all taxes and outgoings are to be discharged by Mr. *Routledge*; and a definitive answer to be given within six weeks from the 18th *March* 1825.”

The Plaintiff, who at this time had only a term of twelve years in the premises, had to apply to his landlord for a new lease, before he was in a condition to accept the Defendant's offer. The Plaintiff having come to an understanding with his landlord, wrote the following note to the Defendant:—

“ Mr. *Routledge* begs to say that he accepts Mr. *Grant's* offer for his house, No. 59. *St. James's Street*, and that he will give Mr. *Grant* possession on the 1st of *August* next.

“ *St. James's Street*, 6th *April* 1825.

“ Mr. *R.* will esteem it a particular favour if Mr. *Grant* will not, for the present, name the subject to any one.”

The Defendant returned the following answer:—

“ 7th *April* 1825.

“ Sir,— I received your note last night, and hasten to acquaint you, that having considered as confidential

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the negotiation respecting your house, I had mentioned it to no one; but, upon consulting with a friend this morning, in whose opinion I have more confidence than my own, I am advised, for some reasons which had not occurred to myself, not to think of taking a house in *St. James's Street* for a dwelling-house. May I therefore request you to permit me to withdraw the proposal I made to you about it? I am in hopes you will make no hesitation to do this, when you consider the spirit of candour and openness in which it was made to you. But should it be otherwise, as I am the last that would willingly act with inconsistency, I will willingly refer the question to friends for decision, and abide by their opinion of the case.

"I have the honour to be, &c.

"ALEX. GRANT."

"Mr. *Thomas Routledge*."

To this the Plaintiff replied as follows:—

"8th April 1825.

"Sir,—In answer to your letter of yesterday, I beg to state, that, relying upon your performing the agreement for the purchase of my house in *St. James's Street*, I have taken another house, and made arrangements which I cannot without great loss relinquish. I hope, therefore, that you will not wish me to withdraw it.

"I am, &c.

"THOS. ROUTLEDGE."

"*Alexander Grant, Esquire*."

The Defendant rejoined,—

"9th April 1825.

"Sir,—Your note of yesterday surprised me, being altogether at variance with your conversation with me two or three hours previous to your note, dated on the evening

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evening of 6th, in which, you must recollect, you one moment declared yourself off; and, finally, you went away to have the opinion of Mrs. *Rowledge*, about the answer you were to send me. How, therefore, you can, under such circumstances, suffer loss and inconvenience from my declining to proceed further in the treaty, I am at a loss to imagine; and I was in hopes you would have been satisfied with what I had stated in reply to your first note, to have had the liberality of letting the matter drop. But if that should not be your intention, I have only to add, that you may proceed with your claim for "loss and inconvenience" as you may think most advisable.

"I am, &c.

"ALEX. GRANT."

"Mr. *Thomas Rowledge*."

The Plaintiff after this surrendered the existing lease to his landlord, and obtained from him a new one, dated 21st *April* 1825, from the 25th *December* 1824, for thirty-two years, for the same clear yearly rent of 250*l.*, payable quarterly; in which the covenants on the part of the lessee were similar to those in the former; and then wrote the Defendant the following letter:—

"Sir,— Upon referring to my letter to you of the 6th instant, accepting your offer for my house, No. 59. *St. James's Street*, I perceive that I, by mistake, stated that I would give possession on the 1st day of *August* next. By your offer, you state that possession is to be given on or before the 25th *July* next; and I inform you that I am ready to give you possession, according to your proposal.

"I am, &c.

"THOS. ROUTLEDGE."

"29th *April* 1825."

This

This letter, on the day it was dated, was delivered at the Defendant's house; and the keys, and a lease of the premises in question, according to the agreement, were tendered to him before the 25th *July*, but rejected.

The six weeks, from the 18th *March* 1825, within which, by the Defendant's proposal, a definitive answer was to be given, expired on the 1st *May* 1825.

Upon these facts it was objected, first, that the Plaintiff being allowed six weeks to accept or reject the Defendant's offer, the Defendant was entitled, also, until it was accepted, to retract it, at any period before the expiration of the six weeks; that there was no acceptance of the terms proposed, till the 29th of *April*, which came too late, the Defendant having retracted his proposal on the 9th. Secondly, that the Plaintiff had not, before the Defendant withdrew his proposal, any such interest in the premises as he was alleged to have in the declaration, or as would have enabled him to accede to that proposal. The Plaintiff was thereupon nonsuited, with leave to move the Court to set the nonsuit aside.

Taddy Serjt. accordingly obtained a rule *nisi* to set aside this nonsuit, and

Wilde Serjt. shewed cause. There was no valid contract binding on both parties. By the terms of the Defendant's proposal, the Plaintiff had six weeks to accept or reject it, and the parties would not have been on an equal footing, if the Defendant had not the privilege of withdrawing his proposal during the same period: having finally withdrawn it on the 9th of *April*, the Plaintiff's acceptance on the 29th came too late, the acceptance on the 6th being out of the question, as not acceding to the terms offered by the Defendant. *Kennedy*

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nedy v. Lee (a) has decided that an acceptance varying in any degree from the terms of an offer, is, in effect, no acceptance; and *Adams v. Lindsell* (b) confirms the principle established in *Cooke v. Oxley* (c), that a party who allows time for the acceptance of an offer, may retract before it is accepted. But the Plaintiff, at the time of the Defendant's offer, and up to the period of his withdrawing it, had no such interest in the premises as that stated in the declaration, nor even such as could have enabled him to meet the proposal; he had only a term of twelve years when he agreed to grant thirty-one. On the ground of variance, therefore, the nonsuit cannot be impeached.

Taddy and Jones Serjts. in support of the rule. The Defendant's offer was made on good consideration; namely, that the Plaintiff should procure him a term of thirty-one years in the premises; and a party cannot retract, during the time which he allows for deliberation, an offer made on good consideration. *Cooke v. Oxley* was determined on the ground that the bargain was *nudum pactum*, and, therefore, without consideration. Lord *Kenyon* said, "at the time of entering into the contract the engagement was all on one side; the other party was not bound; it was, therefore, *nudum pactum*." And *Buller J.* put it on the ground that it ought to have been stated, that the Defendant (who was allowed till four o'clock to consider whether or not he would buy goods on the terms offered) "did agree at four o'clock to the terms of the sale:" from which it may be inferred, that if such a statement had been made in the declaration and proved, the Defendant would have been liable for refusing to perform his contract.

(a) 3 *Meriv.* 454.

(b) 1 *B. & A.* 681.

(c) 3 *T. R.* 653.

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In the present case there is a sufficient consideration, and a sufficient averment and proof of the Plaintiff's agreeing to the terms of the contract before the expiration of the time limited. In *Adams v. Lindsell*, the defendants were held to be bound by an offer to sell upon receiving an answer in course of post, although by accident the answer did not arrive till two days after the next post, and the defendants had, in the mean time, sold the goods to a third person.

With respect to the alleged variance,—it is sufficient that the Plaintiff had a term at his disposal; the time when it was to expire was immaterial, and the allegation that it was to expire in 1756 may be rejected as surplusage. In *Carvick v. Blagrove* (a), where the assignee of the lessor declared in covenant against the lessee, that the lessor at the time of granting the lease was possessed of the premises for the remainder of a term of twenty-two years, commencing from the 25th of December 1797; and the lessee pleaded that the lessor was not at the time of the lease possessed of the remainder of the term in manner and form as the declaration alleged, Dallas C. J. said, “it is objected, ‘that by this plea the precise extent of the term stated in the declaration is put in issue, and that the Plaintiff’s case would be defeated, if it appeared that his term was not of the precise extent alleged.’ But we think such consequence will not follow: the plea puts in issue the substance of the allegation, and the substance of it is, that the lessor being possessed of a term made a derivative demise to the Plaintiff.”

It is sufficient if the party has at the time of the completion of the contract, that which he proposes to sell. And on the 29th of April, before which time there was

(a) 1 B. & B. 536. 4 B. M. 303.

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no complete contract in the present case, the Plaintiff was in possession of the term he agreed to dispose of.

BEST C. J. The nonsuit was right on both grounds. I put it on the same footing as I did at *Nisi Prius*. Here is a proposal by the Defendant to take property on certain terms; namely, that he should be let into possession in *July*. In that proposal he gives the Plaintiff six weeks to consider; but if six weeks are given on one side to accept an offer, the other has six weeks to put an end to it. One party cannot be bound without the other. This was expressly decided in *Cooke v. Oxley*, where the defendant proposed to sell, at a certain price, tobacco to the plaintiff, who desired to have till four in the afternoon of that day to agree to or dissent from the proposal; with which terms the defendant complied; and the plaintiff having afterwards sued him for non-delivery of the tobacco, Lord *Kenyon* put it on the true ground, by saying, "At the time of entering into this contract the engagement was all one side; the other party was not bound." Buller J. said, "It has been argued that this must be taken to be a complete sale from the time the condition was complied with: but it was not complied with; for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time." I put the present case on the same ground. At the time of entering into this contract the engagement was all on one side. In *Payne v. Cave* (a), it was holden that the defendant, who had bid at an auction, might retract his bidding any time before the hammer was down, and the Court said, "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the

(a) 3 T. R. 148.

seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."

These cases have established the principle on which I decide, namely, that, till both parties are agreed, either has a right to be off. The case of *Adams v. Lindsell* is supposed to break in on them; but I think it does not, because the Court put it on the circumstance that the offer was made by the post, and say, "If the defendants were not bound by their offer when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter." If they are to be considered as making the offer till it is accepted, the other may say, "make no further offer, because I shall not accept it;" and to place them on an equal footing, the party who offers should have the power of retracting as well as the other of rejecting: therefore I cannot bring myself to admit that a man is bound when he says, "I will sell you goods upon certain terms, receiving your answer in course of post." However, it is not necessary to touch that decision, for the reasoning of the Court coincides with the principle on which we now determine. As the Defendant repudiated the contract

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on the 9th of *April*, before the expiration of the six weeks, he had a right to say that the Plaintiff should not enforce it afterwards.

But upon the question of variance, we are all of opinion that none of the counts apply. It is not necessary, perhaps, that the termini of the Plaintiff's lease should be set out with precision; but the variance is fatal, if the Plaintiff has not, at least, an interest which will enable him to perform his contract. The variance is not in words, but in substance. The Plaintiff had no such term as that stated in the first and third counts. In the second, he states he had a contract for a lease; — such a contract, to be valid, must be in writing, and he cannot be said to have had it unless he had it in writing. But there was no evidence of any such contract; and, therefore, upon both grounds, the rule must be discharged.

BURROUGH J. (*a*) coincided in discharging the rule on the ground of variance.

GASELEE J. If this case had rested on the first point, I should have wished for time to consider it; but on the ground of variance, I have no doubt that this rule must be

Discharged.

(*a*) *Parke J.* was absent at chambers.

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JONES and Another v. STUDD.

May 12.

ASSUMPSIT. In the first count of the declaration, the Plaintiffs, as indorsees, sued the Defendant as drawer of a bill of exchange for 857*l.* 10*s.* due September 27th, 1826; the second and other counts were for goods sold, money lent, &c.

The Defendant pleaded *non assumpsit* as to the second and subsequent counts, except as to 857*l.* 10*s.* parcel of the sums mentioned in those counts; and as to the 857*l.* 10*s.* in those counts, *actio non*, because after the making of the supposed promises in the declaration mentioned, and before the suit commenced, the Defendant drew his bill on *Fraser* and Co. in favour of *Lupton*, who on the 1st of April 1828 indorsed to Plaintiffs, whereupon Defendant became liable to pay Plaintiffs the amount; *et hoc verifcare*, &c.

And as to the supposed promise and undertaking in the first count; that before the bill of exchange therein mentioned became due, the Plaintiffs indorsed the bill to persons unknown to the Defendant, and delivered it to them; and that it remained in the hands of such persons; whereupon the Defendant became liable to pay them the sum in the declaration mentioned; *et hoc verifcare*, &c.

Upon an affidavit by the Plaintiffs, that the bill indorsed to them by *Lupton* on the 1st of April, a few days after it was made, had remained in their hands till it was discounted by their bankers; but that being afterwards returned by the bankers, the Plaintiff gave

Where, to an action on a bill of exchange, the Defendant pleaded a rambling demurrable plea, which appeared to be a trick on the face of it, the Court ordered it to be struck out on an affidavit of its falsehood, giving the Defendant leave to plead *de novo*, and requiring him to try at the next sittings.

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them a check for the amount, and never again put the bill in circulation; that after it became due they received a letter from the Defendant, praying indulgence,

Taddy Serjt. obtained a rule *nisi*, to strike the second and third pleas out of the plea pleaded. (a)

Jones Serjt., who shewed cause, contended, that if these pleas were struck out, a part of the declaration would be unanswered; and relied on *Smith v. Backwell* (b), where the Court resolved not to interfere with pleas on motion, unless they were a mockery of the Court, or required different modes of trial, or were likely to perplex the Plaintiff unnecessarily with nice points of law.

The Court thought this a plea of the latter description, clearly demurrable, and a mere trick on the face of it.

GASELEE J. said, I think this is a proper and merciful application, and that the rule ought to be made absolute, with leave for the Defendant to plead *de novo*, upon his undertaking to try after term. *Smith v. Backwell* was decided with reference to the particular plea pleaded in that case; but the present case falls within the principle laid down in *Blewitt v. Marsden* (c), where the Court said, "That there might be occasions where they would not enter into any question as to the truth of a plea of judgment recovered, pleaded in the usual form, upon motion, but await the time for producing the roll when such a plea would be regularly disproved;

(a) *Sic.*(b) *Ante*, 512.(c) 10 *East*, 237.

but they expressed great indignation against the abuse which had grown up of late, and was continually increasing, of loading and degrading the rolls of the Court with sham pleas of this nonsensical nature, making them the vehicles of indecorous jesting; by which it sometimes happened that the time of the Court, which ought to be better employed, and was sufficiently engaged with the real business of the suitors, was taken up in futile investigations of nice points, which might arise on demurrers to such sham pleas. And, therefore, in order effectually to put a stop to this practice in future, they made the rules absolute in this and several other causes, wherein the same form of plea had been filed."

Rule absolute.

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DIXON and Another v. HOVILL and Another.

May 12.

THE Defendants being about to send deals by the Plaintiffs' ship, the *Brothers*, found, that in consequence of reports against her sea-worthiness, they could not effect an insurance on their goods at so low a rate as if they were sent by a ship of good character, even of the second class; whereupon, in consideration that they would not abandon their design to send the deals by the Plaintiffs' ship, he undertook to effect an insurance on their goods, and the Defendant never having required to see the names on the policy: Held, that in an action for the premium, he could not object that the names of the underwriters had never been exhibited to him for his approval.

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insurance on the deals at the ordinary rate, with names to the Defendants' satisfaction, pursuant to the following agreement: —

" Messrs. *Hovill* and Sons, — I hold myself responsible to effect an insurance for your goods on board the *Brothers* (*Cape of Good Hope*), valued 300*l.*, at 40*s.* per cent., with such names as shall be to your satisfaction, you paying such premium.

" THOMAS DIXON, Senior.

" P. S. — If the premium of second class ships' insurance should exceed 40*s.* premium, such premium as is given we have no objection to pay.

" J. HOVILL."

The Plaintiffs being thus authorized to effect an insurance on the deals, effected an insurance in the name of *Hoskin* and *Russell*, brokers, for 1000*l.*; 700*l.* on the ship, and the interest in the remaining 300*l.* declared on deals. The policy was left in the hands of *Hoskin* and *Russell*, Plaintiffs' brokers, and the names of the underwriters were never shewn to the Defendant. The ship sailed in *November* 1826, and performed her voyage to the *Cape of Good Hope* in safety; and the Defendants, who knew that their goods had been insured, never enquired about the names of the underwriters, or took any exception to their sufficiency. Having afterwards refused to repay the Plaintiff the premium which he had paid for them on the policy, he sought to recover the amount in this action for money paid to the Defendants' use. At the trial before *Gaselee J.*, *London* sittings after *Michaelmas* term, upon proof of the foregoing facts, a verdict was found for the Plaintiff, notwithstanding it was objected, that to entitle him to claim against the Defendants, he ought to have exhibited to the Defendants the names of the underwriters, to ascertain whether they were satisfactory or not, before he effected the insurance; and

and that an authority to effect an insurance on goods did not warrant the Plaintiffs to effect an insurance on ship and goods. But upon these objections, *E. Lawes* Serjt. having obtained a rule *nisi* to enter a nonsuit instead of the verdict,

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Wilde Serjt., who shewed cause, contended, that the obvious meaning of the agreement was, not that the names of the underwriters should be submitted to the Defendants for their approbation, but that they should be names to which no person could take exception; and that the Defendants having had the advantage of the policy without making any objection, could not now say they had not been satisfied. With regard to the authority, it had been substantially pursued; for the interest of the Plaintiffs in the deals being declared, it was immaterial whether the insurance was separate or joined in an insurance on the ship.

Lawes. The Defendants were entitled to see the names of the underwriters, before they could be called on for the premium. In *Doswell v. Impey* (a), the statute 5 G. 2. c. 30. having authorized commissioners of bankrupts to commit any person who shall refuse to answer "to the satisfaction of the commissioners," it was holden not sufficient for a bankrupt to make such answers to the commissioners as might generally be deemed satisfactory, unless they were actually satisfactory to the commissioners themselves. In *Thirby v. Helbot* (b), where by an award, one of the parties was to be bound with such sureties as the other should approve, and they were then to sign mutual releases, this was holden to mean, not such sureties as should generally be esteemed good, but such as the other party, upon their

(a) 1 B. & C. 173.

(b) 3 Mod. 272.

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being named, should actually approve of; and that as he had the power of disapproving, the award was not final, and, therefore, void: and in *Humphries v. Carvalho* (a), a sale of goods on *Saturday*, subject to the purchaser's approval of their quality on *Monday*, was holden not to be binding on the purchaser till the *Monday* had elapsed without his disapproval. The policy, too, being effected on the ship and goods, was no more within the authority to effect a policy on goods only, than the taking a large house would be within an authority to take a cottage. The policy on the ship, being necessarily in the hands of the Plaintiffs' broker, the Defendants had no means of turning it to their own account; they could never have sued on it.

PARK J. (a) There is no ground for the objection which has been made. The language of the agreement is, "I hold myself responsible to effect an insurance on your goods on board the *Brothers* (*Cape of Good Hope*), valued 300*l.* at 40*s. per cent.*, with such names as shall be to your satisfaction, you paying such premium." It never was intended that the names of the underwriters should be submitted to the Defendants for previous approbation, but merely that they should be unexceptionable names; names of persons competent to pay in case of loss. Then the insurance was effected in *November* 1826; the voyage to the *Cape of Good Hope*, was successfully completed; the Defendants never called for the names of the underwriters; they had the advantage of the protection derived from the insurance during the whole voyage, and now they refuse to pay the premium. The objection has been raised on the word *satisfaction*, which we are called on to read as *approbation*. In *Thirsby v. Helbot*, and *Humphries v. Carvalho*,

(a) 16 *East*, 45.

(b) *Best* C. J. was gone to chambers.

approved

approved is the word employed. As to *Doswell v. Impey*, it is a very far-fetched analogy, to compare the language of a statute giving commissioners authority to commit where an answer is not made to their satisfaction, with the language of a contract, by which a party engages to procure a policy with names to the satisfaction of the person insured.

With respect to the second objection, it is entirely without weight. The insurance was effected on the goods, and though the policy was in the hands of the broker, the Defendants might have sued on it, averring interest in themselves, and a court of equity would have compelled the broker to produce it for the purposes of the suit.

BURROUGH J. If I had fully understood the nature of the objection, I should not have concurred in granting a rule *nisi*.

GASELEE J. Whatever right the Defendants might originally have had to enquire into the sufficiency of the underwriters, it is too late for them now to take the objection, after lying by so long. The rule must be
Discharged.

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May 13.

ROBERTSON v. M'DOUGALL.

The Plaintiff having advertised for sale a bond, executed to him by the Defendant, the payment of which had been resisted in a long course of litigation in which the validity of the bond had been disputed, the Defendant published, among the persons assembled to bid for the bond at an auction, a statement of all the circumstances under which the bond was given, and alluding to the Plaintiff, concluded—"His object is either to extract

money from the pocket of an unwary purchaser, or, what is more likely, by this threat of publication to extort money from me."

Held, that this exceeded the latitude allowed for privileged communications, or observations on titles by a party interested; and that it was a libel, although no express malice was proved.

THE Plaintiff having had differences with one *Æneas Morrison*, agreed to submit them to arbitration, and the Defendant, a *London* attorney, became surety, by bond, for the performance of the award by *Æneas Morrison*.

The deed of submission, bearing date *June* 1823, contained a proviso that it should not vacate on the death of either of the parties.

Æneas Morrison died in *September* 1823.

The arbitrator published his award in *August* 1824, and directed a sum of money to be paid to the Plaintiff; which, not having been paid, he sued the Defendant on the above-mentioned bond.

The Defendant suffered judgment by default in the *King's Bench*, but brought error in the *Exchequer Chamber*, upon which the chief ground of defence was, that, notwithstanding the clause in the deed of submission, the award was void, as having been made after the death of *Æneas Morrison*. (a) He also filed a bill in equity to restrain the Plaintiff from proceeding on the bond, and to compel him to go into all the matters which the arbitration had comprehended.

The Plaintiff, on his part, had issued an execution on the judgment by default in the *King's Bench*, which

(a) 4 *Bingb.* 435.

execution,

execution, as issued after the allowance of a writ of error, was afterwards set aside; and in this state of affairs, before the determination of the writ of error, or of the bill in equity, the Plaintiff advertised the Defendant's bond for public sale by Mr. *Hoggart*, the auctioneer.

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The Defendant had previously offered 1000*l.* to end all matters in difference: the Plaintiff demanded 1250*l.*, which Defendant refused to give, when Plaintiff said, "I will advertise the bond, and he shall see the advertisement under his nose."

Hoggart having written to the Defendant to apprise him of the circumstance, the Defendant wrote the following answer, which, with some introductory matter, he afterwards printed and circulated among the persons who were present in the auction-room when the bond was put up for sale.

"11th April 1827.

"Sir, — I have to acknowledge the receipt of your favour of this date, and have to thank you for the courtesy of the communication. I have no doubt you know me well enough to be assured, that if I owed to Mr. *Robertson* any money on bond, there would be no occasion for him to resort to the wicked expedient he is now attempting. His object is, either to extract money out of the pocket of an unwary purchaser, or, what is more likely, by means of this threat of publication to extort money from me.

"That the bond is not worth one farthing is clear to demonstration, and as there is an existing suit in equity to set it aside, I imagine you will not think you acquit yourself properly to the public, without you add to the advertisement for the sale that there is a suit in dependence. You ask me, whether I would choose that the bond should go into the market? I have no means of preventing you carrying into the market an article of no value; but if by your putting to me the above question, you meant
that

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that I should offer to become the purchaser, I have only to add, that if you were to offer it to me for 10*l.*, I should hesitate about accepting the offer.

" I am, &c.

" ALEXANDER M'DOUGALL."

Upon this the Plaintiff commenced the present action against the Defendant for a libel.

The declaration stated: " That, before the time of committing the said grievances by the Defendant, to wit, on the 17th of *July* 1823, at *London*, &c., the Defendant made his certain bond or writing obligatory, sealed with his seal, and thereby acknowledged himself to be held and firmly bound to the Plaintiff and one *William Roberts* in the sum of 1000*l.*

" That the Plaintiff was desirous of selling, as far as he lawfully might, his interest in the said bond or writing obligatory, by public auction, and for that purpose he, before and at the time of committing the said grievances, to wit, on the 30th of *April* 1827, at *London*, &c., caused the said bond or writing obligatory, and his said interest therein, to be, and the same then and there were, put up to sale by public auction, by one *Charles Launcelot Hoggart*, as the auctioneer and agent of the Plaintiff, in order that the same might be then and there sold for the Plaintiff. Yet the Defendant, well knowing the premises, but greatly envying the happy state and condition of the Plaintiff, and contriving, and wickedly and maliciously intending to injure the Plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects that he, the Plaintiff, had been, and was, guilty of the offences and misconduct thereafter mentioned to have been charged upon and imputed to the Plaintiff,

Plaintiff, and to cause it to be suspected and believed that he had no interest in the said bond or writing obligatory, and that nothing was due and owing thereon from the Defendant to the Plaintiff, and that the same was of no value, and to hinder and prevent the Plaintiff from selling and disposing of the said bond or writing obligatory, and of his said interest therein, and to cause and procure the Plaintiff to sustain and be put to divers great expences attending the said exposure to sale, and to vex, harass, oppress, impoverish, and wholly ruin him the Plaintiff, heretofore and upon the said exposure to sale of the said bond or writing obligatory, and of the Plaintiff's interest therein, and before the said bond, and the Plaintiff's interest therein, had been sold or disposed of, to wit, on the day and year last aforesaid, at *London* aforesaid, &c., falsely, maliciously, and injuriously composed, printed, and published, and caused to be composed, printed, and published, a certain false, scandalous, malicious, and defamatory libel of and concerning the Plaintiff, and of and concerning the said bond or writing obligatory, and the said exposure to sale by the Plaintiff, in which libel was and is contained the false, scandalous, defamatory, or libellous matter following, that is to say: 'The 1000*l.* bond advertised for sale by Mr. *Hoggart*, of *Broad Street*. The above is advertised as if it were a money bond of a responsible gentleman, and how Mr. *Hoggart* can reconcile it to his character to suppress the facts with which he was perfectly acquainted, is for him to explain. The short circumstances are these: Mr. *Æneas Morrison* of *Glasgow*, now deceased, and *John Robertson* of *London*, recently a bankrupt, had occasion to refer to arbitration certain disputed accounts: each party procured a friend to enter into a surety bond in 1000*l.* for the due performance of the award to be made: pending the arbitration, Mr. *Morrison* died, and intimation was given that the surety considered

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considered himself discharged; Mr. *Robertson*, however, forced the matter to proceed, and the arbitrators having differed, he procured from an umpire an award in his own favour. Proceedings have been instituted in equity in this country, and also *Scotland*, to set aside this award, and, of course, to have delivered up, to be cancelled, the bond of the surety for the performance of it. This is the very bond now offered for sale! The following letter will shew that Mr. *Hoggart* was perfectly aware of the circumstances previously to advertising it.' (Here followed the letter before set out; and the declaration concluded, that) "by reason of the premises the Plaintiff had been greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace among his neighbours, and other good and worthy subjects, many of whom suspected and believed, and still do suspect and believe, the Plaintiff to have been, and to be, guilty of the said offences and misconduct, and have, by reason of the committing the said grievances by the Defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with the Plaintiff as they before were used and accustomed to have, and otherwise would have had; and also by reason thereof divers of the liege subjects of our lord the king, who were present at and upon the said exposure of sale, and who were then and there about to be and become purchasers of the said bond and of the Plaintiff's interest therein, and who might and would otherwise have bid for and purchased the same, were then and there deterred and prevented from bidding for and becoming the purchasers of the said bond, and of the Plaintiff's interest, and then and there, and from thence hitherto, have respectively wholly declined to purchase the same, and thereby the Plaintiff was then and there hindered and prevented from selling and disposing of the said bond, and of his said interest therein, and

and hath thereby not only lost and been deprived of all the advantages and emoluments which he might and would have derived and acquired from the sale thereof, but hath been forced and obliged to pay, lay out, and expend divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of 50*l*. in and about the said exposure to sale, and expences incidental thereto, to wit, at *London*, &c. and the Plaintiff hath been, and is, by means of the premises, otherwise greatly injured."

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The general issue was pleaded, and justifications in relation to various parts of the foregoing statement; but there was no plea alleging it to be true that the Plaintiff meant to take in the unwary, or to extort money from the Defendant. At the trial before *Gaselee J.*, *London* sittings after *Michaelmas* term, the Plaintiff's counsel abandoned the charge of slander of title, and confined his claim to the personal libel on the Plaintiff, which it was alleged was included in the Defendant's letter to *Hoggart*. But after proof of the foregoing circumstances, *Gaselee J.* told the jury, that if the Defendant had resorted to the statement concerning the bond as a pretence, and had gone out of his way to attack the Plaintiff's character, he would be liable to answer for it in damages; but if, having a fair ground for his observations on the bond, he had only in warmth a little exceeded the bounds of temperate statement, he stood excused.

The jury were discharged upon the special pleas, and found a verdict for the Defendant upon the general issue.

Spankie Serjt. obtained a rule *nisi* for a new trial on the ground, that though the circumstances in which the Defendant was placed might have justified him in employing strong language with respect to the bond, he
could

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could not go beyond an attack on the title of that instrument, and charge the Plaintiff with extortion and an attempt to take in unwary purchasers.

Wilde Serjt. shewed cause. Taking the whole of the declaration together, it is clear that the action was brought for a libel tending to impede the sale of the Plaintiff's bond; and the circumstances in which the Defendant stood sufficiently excused him for the statement he had made. Where a party has an interest in the subject on which he makes a representation, he is not liable unless the jury find express malice; even though he exceed the bounds of temperate language, malice cannot be implied. The law makes allowance for human infirmity, and excuses the warmth of an expression if the occasion be such as to call it forth. In *Hargrave v. Le Breton* (a), where the Defendant, as agent for a party interested, prevented the sale of an estate by proclaiming that a person who had mortgaged it to the Plaintiff had become bankrupt, Lord *Mansfield* said, "We are clear, that, under such circumstances, malice cannot be implied. No action lies for giving the true character of a servant." In *Pitt v. Donovan* (b), where the Defendant, a trustee for Y., wrote a letter to a person who was about to purchase of the Plaintiff an estate conveyed from Y., stating that Y. was insane, and the conveyance void, Lord *Ellenborough* says, "the learned Judge ought to have embodied in his proposition to the jury, whether, under all the circumstances, the Defendant acted *bonâ fide*, considering the passion, the eagerness to complain, and the character and situation of this Defendant." In *Fairman v. Ives* (c), *Best C.J.* said, "The Defendant seems to have felt that the Plaintiff had treated him very

(a) 4 Burr. 2422.

(b) 1 M. & S. 639.

(c) 5 B. & A. 642.

ill,

ill, and the letter contains such expressions as an angry man was likely to use, and such as would have rendered the letter a libel if it had been sent into general circulation, or to any individual, without a sufficient cause to justify the sending of it. But the circumstances under which this letter was sent, rendered it a privileged communication. It was an application for the redress of a grievance made to one of the king's ministers, who, as the defendant honestly thought, had authority to afford him redress. And this may be done without hazard of an action or prosecution, if the application be made *bond fide*, with a view to obtain redress for some injury received, or to prevent or punish some public abuse." In *McDougall v. Claridge (a)*, where the defendant had an interest in the subject, he was excused for saying that the plaintiff had improperly conducted the concerns of the persons the defendant addressed. And in *Dunman v. Bigg (b)*, the defendant, who supplied the plaintiff with beer, and had promised to inform the plaintiff's surety of any default in the plaintiff's payments, was held excused for telling the surety that the plaintiff was a rogue and a rascal, and had sent back, as unmerchantable, beer which he had adulterated himself; there being money due from the plaintiff to the defendant for beer, in respect of which the surety had given a guarantee. Here, the circumstances of the advertisement and sale of the bond were calculated to irritate the Defendant; there had been much bickering and litigation between the parties; there was nothing from which malice could be inferred, and the strongest expressions against the plaintiff had all reference to the bond in which the Defendant had an interest, and upon the subject of which he was entitled to make representations. The only question, therefore, was, whether those representations, though expressed in

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(a) 1 Campb. 267.

(b) *Ib.* note.

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warm language, were made *bond fide* with a view to the Defendant's own affairs, or whether the subject of the bond was artfully and maliciously made the cover for an attack on the Plaintiff's character. The jury having negatived the latter supposition, there is no ground for a new trial.

Spankie. Although a portion of the declaration complains of slander of title, that was expressly abandoned at the trial, and another portion of it rests altogether on the attack on personal character, and the consequences resulting to the Plaintiff. The cases cited, therefore, are inapplicable, because they all relate to slander of title. But to say that a party acts only for the purpose of extortion, or of taking in the unwary, is an attack on personal character, wholly unconnected with investigation of title, and for which, the previous litigation and bickering between the parties affords no justification, however it might operate in mitigation of damages. But even in slander of title, although where a party has an interest, he is allowed to use strong expressions, he must confine himself to his object, and not travel out of his way to injure his opponent's character. In *Brown v. Croom* (a) it was held that an advertisement in a public paper, strongly reflecting upon the character of an individual who has been declared bankrupt, is libellous, — although published with the avowed intention of convening a meeting of creditors for the purpose of consulting upon the measures proper to be adopted for their own security, — if the legal object might have been obtained by means less injurious.

BEST C. J. This was an action to recover damages for a libel, and it is material to state that the declaration

(a) 2 Stark. N. P. C. 297.

contains a charge against the Defendant for a personal libel, the effect of which is to injure the Plaintiff in his character. There is also a charge for slander of title, but that may be considered as out of the question, having been abandoned at the trial; and the question is, whether this libel on the Plaintiff's character is excused by the circumstances under which it was published. If an individual, unauthorised, publishes reflections on a man's character, and injury results from the publication, the law does not enquire into his motives. But if, in the performance of a duty, he makes charges honestly, even though he express himself with warmth, he is excused; for the law has respect to human infirmity: he must, however, confine himself to what the occasion requires, for if he goes beyond it, imputing base motives, he is not excused, unless he justifies himself by shewing the truth of his assertions. Now, what is the publication in question? "The 1000*l.* bond advertised for sale by Mr. *Hoggart* of *Broad Street*. The above is advertised as if it were a money bond of a responsible gentleman, and how Mr. *Hoggart* can reconcile it to his character, to suppress the facts with which he was perfectly acquainted, is for him to explain. The short circumstances are these. Mr. *Æneas Morrison* of *Glasgow*, now deceased, and *John Robertson* of *London*, recently a bankrupt," — that was a fact he was authorized to state; but he goes on, and after stating the other circumstances attending the bond, concludes with the letter addressed to *Hoggart*, in which he says, "I have no doubt you know me well enough to be assured that if I owed to Mr. *Robertson* any money on bond, there would be no occasion for him to resort to the wicked expedient he is now attempting. His object is, either to extract money out of the pocket of an unwary purchaser, or what is more likely, by means of this threat of publication, to extort money from me." What occasion had the De-

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fendant to introduce the latter branch of the sentence? It could only be malicious; that is, in the legal sense of the term; in other words, mischievous and unjust; and if so, the jury were not authorized to find the verdict they have found. We have been referred to many cases of slander of title, but they are all distinguishable from cases of personal slander, because an action for slander of title is not maintainable unless special damage be shewn. In *Watson v. Reynolds* (a) it was holden, that the attorney of a party claiming title to premises put up for sale, is not liable to an action for slander of title, if he *bonâ fide*, though without authority, makes such objections to the seller's title as his principal would have been authorised in making: but there the words were not actionable in themselves, and that distinction disposes of all the cases on the subject of slander of title. My judgment in *Fairman v. Ives*, if looked at attentively, supports our decision upon the present occasion. In that case a petition was addressed to the secretary at war by the creditor of an officer in the army, *bonâ fide*, and with a view to obtain through his interference the payment of a debt due. The libel was, "Your petitioner solicits your Lordship's well known justice and disposition to benevolence to be extended towards him, by directing an officer in his majesty's service, Captain *W. B. Fairman*, to discharge a debt which has been due to your petitioner above four years, and although frequently applied for, has never been noticed by Captain *Fairman*, but unjustly and unfairly he has deprived your petitioner of any redress except through your Lordship's humane consideration, by giving an address, as will appear by the enclosed, where he had no credit, nor even was known. Your petitioner begs most humbly to enclose

(a) 1 *Moody & Malkin*, 1.

copies of two bills of exchange, one for 100*l.*, and the other for 75*l.* 10*s.*, which your petitioner received in payment for money, and, when due, Captain *Fairman* had given no order to pay them, either at his agents, or at the address of his bills, where your petitioner was informed he did not reside, nor did they know any thing about his bills. Since that period your petitioner has repeatedly written to Captain *Fairman* who, although he has received the letters, has never noticed them, and has concealed himself from a just and lawful demand: your petitioner has no other wish in addressing your Lordship, but that your influence may be extended towards him, by ordering Captain *Fairman* to discharge his debt."

There was nothing objectionable in this: no general abuse; no allegation that Captain *Fairman* was a swindler, nor that he had attempted to extort money; but it was a bare statement of facts; and the Lord Chief Justice told the jury, that if they thought the petition contained only a fair and honest statement of facts, according to the understanding of the party who sent it, they ought to find a verdict for the defendant. In that I agree; but in that it differs altogether from the present case, because the Defendant here, after stating all the facts, goes on to say, "his object can only be to extract money from an unwary purchaser, or, what is more likely, by this threat of publication, to extort money from me." In *Fairman v. Ives*, the Chief Justice said, "I think that it was a good answer to the action, upon the plea of not guilty, for the Defendant to shew that the paper in question was addressed to the secretary at war, *bonâ fide* for the purpose of obtaining redress, and not for the purpose of slandering the Plaintiff." The other Judges all hold the same language; all confine the justification to statements of fact. If such state-

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ments are made even with warmth, supposing them to be made *bonâ fide*, that will not subject the party to an action; but he must not go beyond facts, and charge a person with unwarrantable motives. In *M'Dougal v. Claridge*, the words of the libel are not set out, so that we cannot judge whether they exceeded the due limit or not. *Dunman v. Bigg* goes further than the present case: there the defendant told a surety who was responsible to him for a debt of the plaintiff, incurred for beer sold by the defendant, that the plaintiff wished to cheat him; that he had sent back, as unmerchable, beer which he had himself adulterated; that he was a rogue and a rascal, &c. Lord *Ellenborough* said only that he was *inclined* to think that this was a privileged communication, and a juror was withdrawn, so that the counsel for the defendant does not appear to have been confident that the learned Judge's ruling would have been supported if discussed *in banc*. But *Brown v. Croom* is in point, and founded on the true principle, for Lord *Ellenborough* said, "I have only adverted to cases in order to guard against deciding contrary to the principles laid down in them; but I decide this case on the ground, that though a party may write freely on a subject in which he is concerned, may state facts, and even express himself with warmth, he must not go beyond that which the occasion requires, and criminate others unnecessarily. It was unnecessary for the Defendant in the present case to criminate the Plaintiff, even though he might be unable to avoid expressing himself with warmth; it was mischievous and unjust to criminate him in the way he has done, and, therefore, he is not protected by the situation in which he stood."

PARK J. I am anxious not to draw too strict a line on confidential communications, or statements called for
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in the course of business. But the Court must take care that men do not employ such statements to the injury of their neighbours, and the libel complained of here goes far beyond the business in hand. If the paper had been confined to the first paragraph, it would have been within the reasoning of the cases, and the law of the country. *M'Dougall* had a clear right to state his objections to the sale of the bond; and to state them in strong language. With regard to that he has stated the circumstances under which the bond was given, the bankruptcy of the Plaintiff, and the objections in law which he considered as affecting the validity of the bond: he had a right to state that, within the principle established by the case of *Hargrave v. Le Breton*. There, the agent for a party interested, prevented the sale of an estate, by proclaiming that a person who had mortgaged it to the plaintiff had become bankrupt. That was nothing more than a statement of fact, which a party interested was holden warranted in making, and that would have warranted *M'Dougall* if he had stopped at the first paragraph. But I cannot conceive how that which follows is not to be deemed a libel:—"The wicked expedient he is now attempting."—"His object is to extract money out of the pocket of an unwary purchaser, or, what is more likely, by means of this threat of publication, to extort money from me." A grosser libel on a man in the mercantile world could not be fabricated. In deciding that the Defendant is not excused, we trench on no case which has been cited. *Fairman v. Ives* is clearly distinguishable; there, a petition addressed by the creditor of an officer in the army to the secretary at war, *bonâ fide*, and with a view of obtaining through his interference payment of a debt due, was holden to be no libel, though derogatory to the officer's character, being confined to a statement of facts which

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the creditor was entitled to represent. That was no such libel as the present. Is a man to go into the auction mart and read such a paper as this publicly? It is ridiculous to state such a proposition. No doubt *M'Dougall* was bound to make the statement in the first part; but he had no right to go out of his way to impute wickedness and extortion to the Plaintiff. As to the previous bickering between the parties, that could not be brought forward as a set-off to the libel, but at the utmost as a circumstance to operate in mitigation of damages. In *M'Dougal v. Claridge*, the defendant's communication was held to be privileged, because he was really writing confidentially about a matter in which he was concerned, and charged the plaintiff with improper conduct in management of it: he had a right to do so, and a juror was withdrawn. *Godson v. Home* (a) is precisely in point; there, the defendant having written a letter, blaming the person to whom it was addressed for employing the plaintiff to sue, added, "If you will be misled by an attorney, who only considers his own interest, you will have to repent it. You may think, when you have ordered your attorney to write to Mr. B., he would not do any more without your further orders; but if you once set him about it, he will go to any length without further orders." And *Richardson J.* said, "I cannot say that I left it to the jury, whether this was a confidential communication; I thought it exceeded the line of confidential communication. If a man, giving advice, calls another a thief, surely it is not necessary to leave it to the jury, whether such language is a confidential communication. I left it to the jury to say, whether this was a caution against employing attorneys in general, or against the plaintiff in particular." I think the language used by this De-

(a) 1 B. & B. 7.

Defendant exceeds the line of privileged communications, and that, therefore, the rule must be made absolute.

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BURROUGH J. I had read the record, expecting that I should have tried the cause; and I thought, supposing the words to be proved, that the trial could be no more than a writ of inquiry. The words are clearly libellous. "The wicked expedient he is now attempting," — "his object is, to extract money out of the pocket of an unwary purchaser, or, what is more likely, by means of this threat of publication, to extort money from me." Nobody of common sense can doubt that such expressions constitute a very aggravated libel. There is no necessity for proving malice in such a case; the law implies it, and it is not a question for the jury. If this had been an indictment the Judge must have told the jury the words were clearly a libel.

GASELEE J. If the jury did wrong I was in fault; for I left it to them to say, whether, by the expression, "His object is to extract money out of the pocket of an unwary purchaser, or, what is more likely, by means of this threat of publication, to extort money from me," the Defendant had gone purposely out of his way to attack the Plaintiff's character, or whether, having a fair ground for his observations on the bond, he had in warmth a little exceeded the bounds of temperate statement; and until corrected to day, I should have come to the same conclusion as the jury. This bond was in litigation; *M'Dougall* had offered 1000*l.* to end all matters; but *Robertson* demanded 1250*l.*, which *M'Dougall* refused to give. *Robertson* then said, "I will advertise the bond, and he shall see the advertisement under his nose." *Hoggart*, the auctioneer, then wrote to *M'Dougall*, to request him to pay, in order to prevent the bond from coming into the market; *M'Dou-*

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gall answered that it was of no value, and that he would not purchase it at the sum of 10*l*. He was, therefore, in some degree warranted in supposing that the object of advertising for sale was, to induce him to buy. To that extent his letter appeared to me to be a privileged communication, and that, at all events, it was proper to leave it to the jury to consider, whether the objectionable words had been written with a malicious intention, or escaped him in warmth upon a justifiable occasion; and if they thought he had purposely gone out of his way, to consider the amount of the damage. Probably I did wrong; but I am not at this moment prepared to say so, though I am not presumptuous enough to think that my own opinion is the more correct.

Rule absolute.

May 13.

DOUGLAS and Another, Assignees of STEIN and SMITH, Bankrupts, v. FORREST, Executor of JAMES HUNTER.

An action lies in the *English* courts on a *Scotch* judgment of *born-jug* against a *Scotchman* born.

Where the testator resided and died abroad, Held, his executor in *England* might be sued within six years after taking out probate.

ASSUMPSIT on two *Scotch* decreets. The first count of the declaration (which contained twenty-nine) was as follows:—That heretofore, to wit, on the 25th day of *February* 1802, a certain decree was made and pronounced, in and by the Court of our lord the then king, before the Lords of Council and Session at *Edinburgh*, in that part of the united kingdom of *Great Britain* and *Ireland* called *Scotland*, to wit, at *London*, in and concerning a certain action then depending in the same court, at the instance of *John Stein*, *Thomas Smith*, *Robert Stein*, *James Stein*, and *Robert Smith*, before they became bankrupts, against *James Hunter*,

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Hunter, whereby the Lords of Council and Session aforesaid, did then and there decern and ordain said *James Hunter* to make payment to said *John Stein*, *Thomas Smith*, *Robert Stein*, *James Stein*, and *Robert Smith*, before they became bankrupts as aforesaid, of a certain sum of money, to wit, 447*l.* 6*s.* 3*d.* sterling money of *Great Britain*, and annual rent, that is to say, legal interest thereof, from a certain day, to wit, the 18th of *November* 1801 and until payment, together with 50*l.* of like sterling money, as the expence of process, besides 1*l.* 0*s.* 0*½.* sterling money of *Great Britain*, being the full dues of extracting that decree, as by said decree remaining in said Court of Session at *Edinburgh* aforesaid more fully appears, which said decree remains in full force and wholly unsatisfied, whereby said *James Hunter*, in his lifetime, became liable to pay to said *John Stein*, *Thomas Smith*, *Robert Stein*, *James Stein*, and *Robert Smith*, before they became bankrupts as aforesaid, said sums of money so decreed to be paid as aforesaid, together with such interest as aforesaid, on said sum of 447*l.* 6*s.* 3*d.*, according to said decree, when he said *James Hunter* should be thereunto afterwards requested; and being so liable, said *James Hunter*, in his lifetime, in consideration thereof, afterwards, to wit, on said 25th *February* 1802, to wit, at *London* aforesaid, undertook, and then and there faithfully promised said *John Stein*, *Thomas Smith*, *Robert Stein*, *James Stein*, and *Robert Smith*, before they became bankrupts as aforesaid, to pay them said sums of money so decreed to be paid as aforesaid, together with such interest as aforesaid, when he the said *James Hunter* should be thereunto afterwards requested.

The next eight counts were on the same decret, varying the statement of it, particularly with respect to the day from which interest was to be paid, and laying the

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the promises from *Hunter* to the bankrupts before their bankruptcy.

The next six laid the promises from the Defendant, as executor, to the Plaintiffs, as assignees, after the bankruptcy of *Steins* and *Smiths*, and the death of *Hunter*.

The next seven were on a decret for 75*l.* (with 20*l.* expence of process, and 1*l.* 7*s.* 7½*d.* of extracting,) in favour of *Smith*, with promises from *Hunter* to *Smith* before he became bankrupt.

The last five laid the promises in respect of this decret, from the Defendant as executor, to the Plaintiffs as assignees, after the bankruptcy of *Smith*, and the death of *Hunter*.

The Defendant pleaded the general issue and the statute of limitations.

The Plaintiffs replied, that when the causes of action accrued *Hunter* was beyond seas, where he continued and died, in 1817, and that they sued out their *capias ad respondendum*, and brought their suit within six years next after the Defendant took upon himself the burthen of the execution of the last will and testament of *Hunter* in *Great Britain*, the Defendant having been, ever since the death of *Hunter*, the only person having authority to execute the said last will and testament in *Great Britain*, and there having been no other executor in *Great Britain*.

The Defendant rejoined that the Plaintiffs did not sue out their writ within six years next after the Defendant first took upon himself the burthen of the execution of the said will and testament; upon which, issue was joined.

At the trial before *Best C. J.*, *London* sittings after last *Trinity* term, it appeared that in 1799, *Hunter*, a native of *Scotland*, acknowledged himself to be indebted to *Stein, Smith, and Co. of Edinburgh*, in the sum of 447*l.* 6*s.* 3*d.*, and to *Smith* in the sum of 75*l.*

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He went that year to *India*, whence he never returned, but died there in 1817.

In *February* 1802, two decrees were pronounced against him for these two sums in the Court of Session, one at the instance of *Stein, Smith, and Co.*, the other at the instance of *Smith*. The former was as follows; and the latter in the same form.

“ At *Edinburgh*, the 25th day of *February* 1802, anent the summons and action raised, intended, and pursued before the Lords of Council and Session, at the instance of Messrs. *Stein, Smith, and Co.*, merchants in *London*, and *William Inglis*, writer to the signet, their mandatory against *James Hunter*, son of the deceased *James Hunter*, vintner in *Edinburgh*, late clerk to the pursuers, now abroad, which summons maketh mention that *James Hunter*, son of the deceased *James Hunter*, vintner in *Edinburgh*, late clerk to the pursuers, now abroad, is justly indebted and owing to the pursuers the sum of 447*l.* 6*s.* 3*d.* sterling, as the amount of an account to be produced in process, and here held as repeated *brevitatis causá*, and annual rent of said sum from and since the day of ; and although the pursuers have frequently desired and required the said *James Hunter*, defender, to make payment to them of foresaid sum of 447*l.* 6*s.* 3*d.* sterling, and annual rent thereof from the period before mentioned, yet he refuses, at least delays, so to do. Therefore the said *James Hunter*, defender, ought and should be decerned and ordained by the decree of the Lords of the Council and Session to make payment to the pursuers of the said sum of 447*l.* 6*s.* 3*d.* sterling, and annual rent thereof from and since the said day of , and till payment, together with the sum of 50*l.* sterling, or such other sum as the said Lords shall modify as the expence of process, besides the fees of extracting the decree to follow hereon, conform to the laws and daily practice of
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Scotland used and observed in the like cases in all points as is alleged; and anent the charge given in virtue of the foresaid summons, (by a messenger at arms, in manner prescribed by law, to the said *James Hunter*, defender, at the market cross of *Edinburgh*, pier and shore of *Leith*, as being furth of *Scotland* at the time,) upon the 18th day of *November* 1801, to have compeared before the said Lords on two certain diets bygone to have answered at the instance of the pursuers in the said matter, and heard and seen the premises verified and proven, and decret and sentence given and pronounced therein, conform to the conclusions of the foresaid summons, or else to have alleged a reasonable cause in the contrary, with certification as in the said summons and execution thereof is expressed; the pursuers compearing by Messrs. *Henry David Inglis* and *James Gordon*, advocates, their procurators, who for them produced in presence of the said Lords account lybelled on of the contents foresaid, and the defender having been lawfully summoned to this action as aforesaid, and failing to appear, the foresaid summons, execution thereof, account lybelled on and produced in absence of the defender, and steps of procedure after related, being all at length read, heard, seen and considered by the said Lords, and they being therewith well and ripely advised, the Lords of Council and Session decerned and ordained, and hereby decern and ordain the said *James Hunter*, defender, to make payment to the pursuers of the foresaid sum of 447*l.* 6*s.* 3*d.* sterling, and annual rent thereof, from and since the said day and till payment, together with the sum of 50*l.* sterling as the expence of process, besides the sum of 1*l.* 0*s.* $\frac{1}{2}$ *d.* sterling, being the full dues of extracting this decret; because after elapsing of the diets and compearances contained in the aforesaid summons the same was tabled and called in the Outer House in

in common form, and in respect of the absence of the defender was appointed to the roll, and being accordingly enrolled in the regulation roll for the Outer House, by course whereof the same came in and was called on the 25th day of *February* 1802, the day and date hereof, in presence of Lord *Armadale*, Ordinary in the Outer House for the time, when the said Mr. *Henry David Inglis*, for the pursuers, resumed the lybel, and craved decreet in terms thereof; and the defender having not only been lawfully summoned to the action as aforesaid, but also oft and divers times this day publicly called by a macer from the bar, as use is, yet he failed to appear, as was clearly understood by the Lord Ordinary. In respect of all which his Lordship held the defender as confest on the verity of the lybel, and account lybelled on and produced and decerned in absence, in terms of the lybel. And so the said Lords gave and pronounced their decreet and sentence in the said matter in manner aforesaid, and ordain letters of *horning* on fifteen days charge, and all other exeolls needful to pass hereon in form as effairs. Extracted upon this and the three preceding pages by

“ALEXANDER MENZIES.”

By a decree of the same court of *July* 1804, that court adjudged that certain heritable property to which *Hunter* was entitled in *Scotland*, should belong to *Smith, Stein, and Co.*, in payment and satisfaction of the sum of 447*l.* 6*s.* 3*d.*, with interest from the 11th of *June* 1799; and by another decree of the same date, the court adjudged that certain other heritable property of *Hunter's* should belong to *Smith*, in payment and satisfaction of the sum of 75*l.*, with interest from the 11th of *June* 1799.

Hunter had no notice of any of these decrees; but a *Scotch* advocate proved that by the law of *Scotland* the Court of Session might, after such proclamations as
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were mentioned in these decrees had been made, pronounce judgment against a native *Scotchman*, who had heritable property in that country, for a debt contracted in *Scotland*, although the debtor had no notice of any of the proceedings, and was out of *Scotland* at the time; that a person against whom such a decree was pronounced might at any time within forty years, but not after, dispute the merits of such decree; and that the decrees adjudging the heritable property to the creditor would not operate as a satisfaction of his debt during the period in which the debtor had a right to dispute the validity of the first judgment. He also proved that when decrees adjudged interest, but did not specify the time from which it was to run, the interest was payable from the time of the citation.

In *July* 1819, the *East India* Company received in *London*, from the registrar of the Supreme Court of Judicature at *Fort William*, in *Bengal*, a certificated copy of *Hunter's* will; but as late as *July* 1822, the Defendant, in answer to an application for payment, wrote to the Plaintiffs as follows:—

“Captain *Forrest* is informed that *Hunter* is dead, and that he, Captain *F.*, is the executor; but it would not be proper for him to act until he receives an authenticated will to that effect, to be proved here. Captain *F.* will write out to *India* without delay;”

He did not take out probate till *March* 1824. There was no other executor in *Great Britain*.

At the trial it was objected that an action did not lie in our courts on this *Scotch* decreet, it having been obtained in *Hunter's* absence, and without notice to him; that the Plaintiffs were barred by the statute of limitations; and that interest could not be recovered, the original decreets having specified no day from which it should run. *Buchanan v. Rucker* (a), *Williams v. Lord*

(a) 1 *Campb.* 63. 9 *East*, 191.

Bagot (a), and *Cavan v. Stewart* (b) were cited on the first point, and *Murray v. East India Company* (c) on the second; but a verdict was taken for the Plaintiffs, subject to the consideration of these points.

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Wilde Serjt. moved for a new trial and in arrest of judgment on these grounds, and a rule *nisi* having been granted,

Bosanquet and *Taddy* Serjts. shewed cause. First, this action lies on the *Scotch* judgment. *Hunter* was a *Scotchman* born; as such, he was subject to the laws of *Scotland*, and by those laws, a *Scotchman* born possessed of heritable property in *Scotland*, and *further* from that country may have a judgment pronounced against him on proclamation at the market-cross of *Edinburgh*, and shore and pier of *Leith*. The courtesy of the courts of this country will enforce the judgments of another, unless there be any thing manifestly unjust or unreasonable upon the face of such judgments. But as *Hunter's* property was protected by the law of *Scotland*, there is nothing unreasonable or unjust in its being subject to such decrees as that law may pronounce in favour of creditors; and if decrees, such as the present, had been found to operate with injustice, the law which enforces them would scarcely have prevailed during so long a period. The validity of them is, however, admitted by the legislature in the statute 54 G. 3. c. 137., which not only recognizes the principle on which they are founded as being according to the law of *Scotland*, but enacts, that on notices being given at the market-cross at *Edinburgh*, and on the pier and shore of *Leith*, creditors may issue a sequestration against the effects of their debtors. Nor is there any thing in the practice re-

(a) 3 B. & C. 772. (b) 1 Stark. 525. (c) 5 B. & A. 204.

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pugnant to the law of *England*; for under the process of foreign attachment in the city of *London*, if a creditor issue a summons against a debtor to which there is a return of *nihil*, goods belonging to the debtor in the hands of a third person, or debts due to him, may be attached; and though *De Grey* C. J., in *Fisher v. Lane* (a), expressed his disapprobation of the practice, yet it has always prevailed, and the judgment of the Court, according to the report in *Blackstone* (b), turned on the circumstance that there had been no return of *nihil*. In *Buchanan v. Rucker* (c), which was an action upon a judgment obtained against the defendant in the island of *Tobago*, the Court held the proceedings invalid, because it did not appear that the defendant had ever been in the colony, had property there, or was subject to the jurisdiction of the colonial court; and in *Cavan v. Stewart*, where the defendant was sued on a *Jamaica* judgment, Lord *Ellenborough* said, that it ought to have been proved that, at least, he was once in the island of *Jamaica*. In *Williams v. Lord Bagot*, a custom to issue a summons to appear, and an attachment at the same time, was holden to be a bad custom, but that is a practice altogether different from the *Scotch*, in which proclamation is made before ulterior proceedings are entered on.

Secondly, the operation of the statute of limitations did not commence till there was some person in *Great Britain*, against whom the Plaintiffs could proceed, and as late as *July* 1822, the Defendant had not only not taken out probate, but proposed to write to *India* to ascertain whether or not there was any valid will. In *Murray v. E. I. Company*, it was holden that where the debt was contracted while the debtor was abroad, where he died, without returning, the six years prescribed by

(a) 3 *Wils.* 302.(b) 2 *Bl. Rep.* 834.(c) 9 *East*, 192.

the statute did not commence running till administration was taken out. And though an executor be appointed by the will, and it may therefore be said that a creditor may know him before probate is taken out, yet a party is not bound to recognise any one as executor till he takes upon himself to act; for, peradventure, he may renounce, and then it would be vain to proceed against him. No doubt, if he acts, he may be sued before he proves the will; but if he neither proves nor acts, he may sue the executor who *does* act, (*Rawlinson v. Shaw* (a)), which he could not do if he were himself liable to be sued as executor; for in such case he must be joined as defendant with the other, and a man cannot be at once plaintiff and defendant. In *Wentworth's Office of Executor*, 41. it is said, that "he that sues need not notice more than do take out probate or administration;" so in *Toller*, 471. it is said, that such as have not administered may be omitted; and though *Wentworth* says, (p. 36.) that an executor may be sued before will proved, that, consistently with the authorities, can only be where he has acted.

Thirdly, the testimony of the *Scotch* advocate disposes of the objection touching the time for which interest is to be paid; at all events the omission, if material, is cured by the decrees of 1804.

Wilde. An action on a foreign judgment is maintainable in our courts, on the ground of an implied promise to pay the debt adjudged. But the courts will not imply a promise, where, on the face of the proceedings, such an implication would be contrary to reason and justice. If it were to be implied in every case, as a matter of course, it must be implied as well upon a judgment in *Turkey* or *Algiers*, resting on absurd and bar-

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(a) 3 T. R. 559.

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barous laws, as upon the judgments of the most enlightened courts. The judgments of foreign courts before they can be sanctioned, must undergo investigation, and can only be supported where there is nothing absurd or unjust on the face of them: they are not proof, but only *prima facie* evidence of a debt. But nothing can be conceived more absurd or unjust than this *Scotch* decret appears to be on the face of it. To decide in the absence of one of the parties, and without notice to him of any cause depending, is contrary to the first principles of justice. In *Fisher v. Lane, De Grey C.J.*, expressly says, "A custom contrary to the first principles of justice can never be good; this custom, not to summon or give notice to a Defendant in a suit commenced against him, is contrary to the first principles of justice, and in my opinion, as at present advised, can never be good." In *Buchanan v. Rucker*, in answer to an argument that the presumption was in favour of a foreign judgment, Lord *Ellenborough* said (a), "That may be so, if the judgment appears on the face of it consistent with reason and justice; but it is contrary to the first principles of reason and justice, that either in civil or criminal proceedings a man should be condemned before he is heard;" — "If the practice were proved, it is *mala praxis*, and cannot be sanctioned. If a judgment could thus be recovered against any one behind his back, a man would have nothing more to do but go to *Tobago*, there sue us to any amount, and then return to this country to put his judgment in force against us." — "But the practice here contended for is opposite to right reason and shall not prevail." In like manner a party might, without the knowledge of his debtor, convey to him heritable property in *Scotland*, and having recovered a judgment in his absence, pro-

(a) 1 *Campb.* 66.

ceed against him to any amount in this country. The process of foreign attachment in *London*, affects only the goods and debts of the party; it is therefore distinguishable from a judgment like this decret, which affects his person if he can be found; and the custom of issuing an attachment against the person concurrently with summons, and before hearing, has expressly been holden to be bad in an inferior court. *Williams v. Lord Bagot*.

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Secondly, the action is too late. An administrator, it is true, can only be sued after he has taken out letters of administration, for it is from them alone that his title to meddle with the intestate's effects is derived; *Murray v. E. I. Company*; but an executor is appointed by the will, and the authorities are all clear that he may sue and be sued before he takes out probate; *Plowden*, 280 b. *Com. Dig. Administration*, B. 9. *Cro. Eliz.* 92. *Wentw. Off. Exor.* 38.; otherwise by delaying probate, he might delay, *ad infinitum*, a just claim against his testator's property. He can only discharge himself by pleading *ne unques executor*, and it is not enough to say, simply, that he has not administered the testator's effects. No distinction is expressed in the authorities between cases where the executor acts, and where he abstains to act.

The learned Serjeant forbore to press the objection about the accrual of the interest, but contended that the decret of 1802 was satisfied by that of 1804, which gave the Plaintiff *Hunter's* heritable property, expressly in satisfaction of the debt, and which had never been impeached.

Cur. adv. vult.

BEST C. J. This was an action brought by the assignees of *Stein and Co.* bankrupts, against the executor of the will of *John Hunter*.

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On the 31st *May* 1799 the testator acknowledged himself to be indebted to *Stein* and Co. in the sum of 447*l.* 6*s.* 3*d.*; and on the 11th *June*, in the same year, he acknowledged that he owed 75*l.* to *Robert Smith*, one of the bankrupts, and one of the firm of *Stein* and Co. These debts were contracted in *Scotland*, of which country the deceased was a native, and in which he had a heritable property. Shortly after the year 1799, the deceased went to *India*. He died in *India* in 1817, having never revisited *Scotland*.

On the 25th *February* 1802 two decrees were pronounced in the Court of Session in *Scotland* against the deceased, one at the instance of *Stein* and Co., and the other at the instance of *Robert Smith*. In the first of these the deceased was ordered to pay to *Stein* and Co. 447*l.* 6*s.* 3*d.*, with interest, from the day of besides expences of process, &c. In the second decree the deceased was ordered to pay *Robert Smith* the sum of 75*l.*, with interest, from the of , besides expences of process, &c. It appeared, from these decrees that the deceased was out of *Scotland* at the time the proceedings were instituted in these causes. He never had any notice of those proceedings. The decrees stated, that the deceased had been (according to the law of *Scotland*) summoned at the market cross of *Edinburgh*, and at the pier and shore of *Leith*. A *Scotch* advocate proved, that, by the law of *Scotland*, the Court of Session might pronounce judgment against a native *Scotchman* who had heritable property in that country, for a debt contracted in *Scotland*, although the debtor had no notice of any of the proceedings, and was out of *Scotland* at the time. After such proclamations as were mentioned in these decrees had been made, the same witness proved, that a person against whom such a decree was pronounced, might, at any time within forty years, dispute the merits of such decree; but that after the expiration

ation of forty years, it was conclusive against him, and all who claimed under him.

By a decree of the Court of Session, of the date of the 5th *July* 1804, that Court adjudged that certain property which the deceased possessed in *Scotland* should belong to *Robert Smith* and his heirs, in *payment* and *satisfaction* of the sum of 75*l.*, with interest, from the 11th *June* 1799. By another decree of the same date, the Court of Sessions adjudged, that certain other property of the deceased in *Scotland* should belong to *Stein* and Co. and their heirs, in *payment* and *satisfaction* of the sum of 447*l.* 6*s.* 3*d.*, with interest, from the 11th of *June* 1799. The two last decrees fill up the blanks left in the first decrees, by giving the time from which interest was to be paid on the debts, namely, from the 11th *June* 1799; and if the Plaintiffs can maintain their action, entitles them to a verdict for the sum of 862*l.* The terms in which the two last decrees are expressed, seem to import that the lands adjudged to *Stein* and Co. and *Smith*, were given to and accepted by them, in satisfaction of these debts; but this cannot be the true construction of these decrees, because none of the decrees are conclusive against the deceased and those who claim under him, until the expiration of forty years from the time of pronouncing the two first decrees. The advocate who was examined in the cause proved, that by the law of *Scotland*, these decrees would not operate as satisfaction of the debts, during the period that the debtor had a right to dispute the validity of the first judgments. A *Scotch* statute, which we have looked into, shews the accuracy of the opinion given to us on the *Scotch* laws by the learned advocate: and I feel it due to him to say, that, from the manner in which he gave his evidence, the clearness and precision with which he explained the grounds of his opinion, I have no doubt that he is extremely well acquainted with the

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Scotch law, and that we may safely rely on every part of his evidence.

The two last decrees, proving that interest was to run from 1799, and the testimony of the learned advocate, who proved, that when decrees adjudged that interest should be paid, but did not shew the time from which it was to run, interest was payable from the time of the citation, — disposes of the objection that no interest could be recovered upon these decrees.

The Plaintiffs rested their claim on these decrees. The Defendant insisted that these decrees would not support an action in our Courts, because they were repugnant to the principles of justice, having been pronounced whilst the deceased was at a great distance from *Scotland*, and without any notice given to him that any proceedings were instituted against him. This defence was made on the general issue. The Defendant also pleaded, that the Plaintiff's cause of action did not accrue within six years before the commencement of the suit. To this there was a replication, that the deceased, at the time when the cause of action accrued, was beyond seas, and remained beyond the seas until the year 1817, when he died; and that the Plaintiffs sued out their writ against the Defendant, within six years after he first took on himself the burthen and execution of the will of the deceased in *Great Britain*, and that he had no other executor in *Great Britain*. This replication was fully proved, and, therefore, the issue taken on it was properly found for the Plaintiffs.

The questions to be decided are, first, whether an action can be maintained in *England* on these judgments of the Court of Session in *Scotland*. Secondly, whether the replication is an answer to the pleas of the statute of limitations.

On the first question we agree with the Defendant's counsel, that if these decrees are repugnant to the principles

ciples of universal justice, this Court ought not to give effect to them; but we think that these decrees are perfectly consistent with the principles of justice. If we held that they were not consistent with the principles of justice, we should condemn the proceedings of some of our own courts. If a debt be contracted within the city of *London*, and the creditor issues a summons against the debtor, to which a return is made, that the debtor hath nothing within the city by which he may be summoned, or, in plainer words, hath nothing by the seizure of which his appearance may be enforced, goods belonging to the debtor in the hands of a third person, or money due from a third person to the debtor, may be attached; and unless the debtor appears within a year and a day, and disputes his debt, he is for ever deprived of his property or the debts due to him.

In such cases the defendant may be in the *East Indies* whilst the proceedings are going on against him in a court in *London*, and may not know that any such proceedings are instituted. Instead of the forty years given by the *Scotch* law, he has only one year given to him to appear and prevent a decision that finally transfers from him his property. Lord Chief Justice *De Grey* thought this custom of foreign attachment was an unreasonable one, but it has existed from the earliest times in *London*, and in other towns in *England*, and in many of our colonies from their first establishment. Lord Chief Justice *De Grey* and the Court of Common Pleas, after much consideration, decided against the validity of the attachment, according to the report in 3 *Wilson* 297., because the party objecting to it had *never been summoned or had notice*. The report of the same case in 2 *Blackstone*, 834., shews that the Court did not think a personal summons necessary, or any summons that could convey any information to the person summoned, but a *summons with a return of nihil*; that is, such a

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summons as I have mentioned, namely, one that shews that the debtor is not within the city, and has nothing there, by the seizing of which he may be compelled to appear. The 54 G. 3. c. 137. not only recognizes the practice on which these decrees are founded, as being according to the law of *Scotland*, but enacts, that on notices being given at the *market cross* at *Edinburgh*, and on the *pier* and shore of *Leith*, to debtors out of the kingdom, in default of their appearance the creditors may issue a sequestration against their effects. Can we say that a practice which the legislature of the United Kingdom has recognized and extended to other cases is contrary to the principles of justice?

A natural-born subject of any country, quitting that country, but leaving property under the protection of its law, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation.

The deceased, before he left his native country, acknowledged, under his hand, that he owed the debts; he was under a moral obligation to discharge those debts as soon as he could. It must be taken for granted, from there being no plea of *plene administravit*, that the deceased had the means of paying what was due to the bankrupts. The law of *Scotland* has only enforced the performance of a moral obligation, by making his executor pay what he admitted was due, with interest during the time that he deprived his creditors of their just debts.

The reasoning of Lord *Ellenborough*, in the case of *Buchanan v. Rucker* (a), is in favour of these decrees. Speaking of a case decided by Lord *Kenyon*, his Lordship says, in that case the defendant had property in the

(a) 1 *Campb.* 63. and 9 *East*, 192.

island,

island, and might be considered as *virtually present*. The Court decided against the validity of the attachment, because it did not appear that the party attached ever was in the island, or had any property in it. In both these respects that case is unlike the present. In the case of *Cavan v. Stewart*, Lord *Ellenborough* says, you must prove him summoned, or, *at least*, that he was once in the island of *Jamaica*, when the attachment issued.

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To be sure if attachments issued against persons who never were within the jurisdiction of the Court issuing them, could be supported and enforced in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it.

The only other case that has been mentioned is that of *Williams v. Lord Bagot*; in that case a summons to appear, and an attachment to compel appearance issued at the same time, and was returnable at the same time. These proceedings were not only contrary to justice, but contrary to our law, and the court from which these proceedings issued was governed by *English* law.

Upon the second question we are of opinion that the replication is an answer to the pleas of the statute of limitations. The words of the 21 *Ja.* 1. c. 16. s. 3. are, that the action shall be brought "within six years next after the
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the cause of such actions or suits, and not after." Although the injury of which the Plaintiffs complain has existed more than six years, yet they had no cause of action until there was some person within the realm against whom the action could be brought. Cause of action is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue. The deceased was never in *England* after the cause of action accrued against him; after his death there was no person in *England* against whom the Plaintiffs could proceed, until the Defendant took upon himself the execution of his will. The Defendant did not act as executor, or prove the will of the deceased, until 1824. An executor may do many acts before he has proved the will, and when he has proved the will, his right to the testator's property has relation to the time of the testator's death, but we do not think that any action can be maintained against him as executor, until he has taken upon himself to act as such, or has proved the will.

One who is appointed an executor may renounce. It would be injustice to allow actions to be brought against one appointed executor, who never meant to act as such, before he had an opportunity of renouncing. If he be liable to actions before he has acted as executor, or proved the will, his liability must arise on the instant of the death of the testator, and many actions might be brought against him before he could renounce, and from these actions he could not be relieved without expence and trouble. All that the passages in *Plowden*, 280 b., and *Com. Dig.* (B 9.) tit. *Administration*, to which we were referred, prove, is, that an executor may be sued before he has proved the will. If he has acted as executor he may be sued as executor, whether he has proved the will or not. In the present case the Defendant had not acted before 1824, when he obtained

tained probate. In *Rawlinson v. Shaw* it was determined that if a debtor makes his creditor one of his executors, the creditor, not having proved the will, or acted in its execution, may sue the other executor for his debt. A man cannot sue as Plaintiff who might be sued as Defendant. In *Joliffe v. Pitt (a)* it is stated by the reporter to have been agreed, that no laches can be attributed to a man for not suing whilst there was no executor against whom he could bring his action. I presume that this point was agreed to by the counsel for all the parties. The report then states, that "the Chancellor inclined to be of opinion that the statute of limitations was not to take place." This point, however, was not decided by the Court. In *Webster v. Webster (b)*, it appeared that the testator died in 1786; the will was proved in 1802. The Lord Chancellor said, that as there was no representative until 1802, there was no person who could be sued, and therefore the statute of limitations could not be pleaded. His Lordship's attention was afterwards called to an allegation on the bill, that shewed that the executor had taken possession of the testator's property previously to 1792, upon which he allowed the plea of the statute of limitations, and said there was not only a cause of action, but an opportunity of suing in 1792. This decision is an authority in point, to shew that the statute only runs from the time that an executor has either acted or proved the will. The replication in this case is a good answer to the plea. The postea must be delivered to the Plaintiffs, and the verdict entered for them, for 862*l.*

Judgment for the Plaintiffs.

(a) 2 *Vern.* 694.

(b) 10 *Ves.* 93.

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May 14.

DITCHAM v. CHIVIS.

Plaintiff alleged that Defendant, having agreed to convey her safely by his coach from *London* to *Blackheath*, neglected his duty, by throwing her down, &c.

Defendant's coach ran from *Charing Cross* to *Blackheath*, and Plaintiff, got up at *The Elephant and Castle*; but Defendant had inscribed on his coach "*London to Blackheath*:" Held, no variance.

CASE against the Defendant, a coach proprietor, for not safely carrying the Plaintiff from *London* to *Blackheath*.

The declaration stated, that the Defendant was owner of a stage-coach running from *London* to *Blackheath*, and that the Plaintiff, at his request, agreed to become an outside passenger, to be safely carried from *London* to *Blackheath*, whereupon it became the Defendant's duty to use proper care in carrying her: that Defendant, not regarding his duty, did not take proper care, but permitted the horses to move on while the Plaintiff was getting up, whereby she was thrown down with great violence, and much bruised and wounded.

At the trial before *Park J.*, *London* sittings after *Michaelmas* term, it appeared, that the Defendant's coach was licensed to run from *Charing Cross* to *Blackheath*; but that the Defendant would not evade the stamp duty by going through the city of *London*; and that the words *London to Blackheath* were painted on his coach; that the Plaintiff, a female of sixty, was (at the *Elephant and Castle*, *St. George's Fields*), in the act of getting up into the dickey (the hinder part) of the coach, assisted by the cad, when the coachman, whose face was turned towards *Greenwich*, drove swiftly off; in consequence of which the Plaintiff fell, and was seriously injured in the knee.

It was objected, that as the Plaintiff got up at the *Elephant and Castle*, there was no proof of the allegation in the declaration, that she had agreed to go from *London* to *Blackheath*, nor that the Defendant's coach

coach ran from *London* to *Blackheath*, the variance was fatal. The learned Judge reserved the point, but a verdict was found for the Plaintiff.

Taddy Serjt. having on these grounds obtained a rule *nisi* to set aside the verdict and enter a nonsuit instead,

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Wilde Serjt. now shewed cause.

The contract is correctly stated, and the evidence shews that the Defendant's coach ran from *London* to *Blackheath*. The word *London* must be taken according to the understanding of the parties, which was not confined to the city of *London*, strictly and technically speaking, but to the whole of that ambit, which, vulgarly and collectively, is called *London*. At all events the Defendant is estopped to say that such is not the sense he has put on the word, since the inscription on his coach was, "From *London* to *Blackheath*;" though he started from *Westminster* and never passed the city. It would be no sufficient answer to the Defendant's demand of a fare at *Blackheath*, from a person who had mounted at *Westminster*, for the latter to say, there is nothing due, because the engagement is to run from *London*. But, admitting that the objection might have availed if this had been an action of *assumpsit* in which the contract would have been the gist of the action, yet, in case, where the gist of the action is the Defendant's negligence in the discharge of a duty, the precise statement of the preliminary contract is immaterial, and any inaccuracy may be rejected as surplusage. In *Burbidge v. Jakes* (a), which was an action on the case for a nuisance, the declaration stated that the plaintiff was possessed of a messuage at *Sheerness*; at the trial it was proved that the house was situated in the parish of *Minster*, which is contiguous to *Sheerness*, and that the

(a) 1 B. & P. 225.

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two together commonly went by the name of *Sheerness*: the variance was holden to be immaterial. Even in *assumpsit*, upon an agreement that the defendant would procure the Plaintiff a booth at a horse-race upon *Barnet Common*, the declaration stated, that an entertainment of horse-racing being about to be had on *Barnet Common*, in the county of *Middlesex*, it was agreed, &c. At the trial it was proved, that the whole of *Barnet Common* lay in *Herts*; but Lord Mansfield said the gist of the agreement was the procuring the booth; that it was immaterial, whether the common were in *Middlesex* or not; and that the word might be rejected; *Frith v. Gray*. (a) So in *Drewry v. Twiss* (b), proof that the defendant's boat ran down the plaintiff's in the *Half-way Reach* in the *Thames*, was holden sufficient to support an allegation that the boat was run down in the *Thames near the Half-way Reach*. So here, it was immaterial whether the Plaintiff mounted the coach at the place of starting, or chose to walk on for a short distance. It did not appear that a different fare had been paid.

Taddy and *Andrews* Serjts. supported the rule.

There are many acts of parliament which recognise *St. George's Fields*, where the *Elephant and Castle* stands, as being no part of *London*; the Defendant, therefore, was never under any agreement to convey the Plaintiff from *London* to *Blackheath*, and it is only in respect of such an agreement that the duty charged in the declaration is supposed to arise. Perhaps, it was not necessary for the Plaintiff to have stated the preliminary agreement, but having stated it, she must prove it as laid; otherwise a recovery in this action would be no bar to a recovery in a second action for

(a) 4 T. R. 561. n.

(b) 4 T. R. 558.

the same injury, if the Plaintiff were in the second action to lay it as an injury happening upon an agreement to carry her from *St. George's Fields* to *Blackheath*. In the cases cited, there was no mis-statement of any contract, but merely a mis-statement of facts; — facts immaterial to the contract, even where a contract existed. In *Frith v. Gray*, the contract was to furnish a booth; the allegation about the horse-race on *Barnet Common* was merely introductory. But if the contract be once stated, it stands entire, and no part can be rejected as surplusage.

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BEST C. J. I have no objection that it should be said of me that I always entertained a strong impression against deciding on the ground of variance. That impression will never induce me to overturn the law; but I see enough here to relieve the Plaintiff from this objection. The agreement here must be taken according to the intention of the parties, and by *London*, they meant, not the city, strictly speaking, but what is usually called *London*: and if we wanted assistance to find such a construction of the word, the Defendant has furnished it to us, for if *London* means the city only, he never performs his contract, for he never starts from or passes through the city. It must, therefore, mean some place which in common parlance is styled *London*; and if *Westminster* be included, even with its separate jurisdiction, *a fortiori*, may the *Elephant and Castle* be included, which is nearer to the city than *Westminster*. The contract here, is a contract to carry from that place which the parties understood to be *London*, and the Defendant has shewn what his understanding of the word is, from the inscription on his coach, and the place from which he starts. That this is the proper construction of the contract, may be collected from the case of *Burbidge v. Jakes*, in which the declaration states,

that

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that the plaintiff was possessed of a messuage at *Sheerness*. At the trial it was proved that the house stood in the parish of *Minster*, which is contiguous to *Sheerness*, and usually goes under that name: the variance was held to be immaterial. That case bears us out in saying that the Plaintiff has correctly described this contract as being a contract to carry her from any place within the ambit of that which is usually called *London*.

PARK J. concurred.

GASELEE J. I cannot deem this allegation immaterial; but I think the verdict may be supported on the grounds stated by the Lord Chief Justice; and I rely on the conduct of the Defendant for the construction to be put on his contract to convey from and to *London*. What would he say, if a passenger arriving at *Charing Cross*, were to refuse to pay on the ground that the engagement was to convey him to *London*? The case of *Burbige v. Jakes* is in point; the house described to be in *Sheerness*, was not in *Sheerness*, but in *Minster*, which is in the same district, and the Court held that in substance that supported the allegation. The rule, therefore, must be

Discharged.

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FOTHERGILL v. WALTON and RONDEAU.

May 16.

LAWES Serjt. obtained a rule, calling on the administratrix and assignees of the Plaintiff (he having been a bankrupt), to shew cause why the Defendant, *Rondeau*, should not be discharged out of custody as to the execution in this action, on the ground that the Plaintiff had sued as a trustee only, and that his administratrix and assignees disclaimed all right, title, claim, or interest in or to the damages recovered.

Rondeau's affidavit stated, that under a charter-party entered into by the Defendants, the ship *Elizabeth*, then lying at *Havre de Grace*, was to proceed to *Terceira*, and Plaintiff engaged to ship and take on board at *Havre* six pipes of brandy, the freight and amount of which was to be taken out in fruit at a certain price; in consideration of which, the Defendants agreed to pay freight, and guarantee a full cargo home:

Where administration had been taken out, the Court refused, without the authority of the administratrix, to discharge Defendant out of execution after the death of the Plaintiff, although his administratrix and his assignees (he having been a bankrupt), disclaimed all interest in the action.

That the Defendant, *Walton*, went to *Terceira*, and contracted for fruit in barter for brandy; that the ship arrived in ballast, without the brandy; that the master wrote for the cargo to be delivered; that the Defendant answered, he was ready with a cargo, on delivery of the brandy; but, that without the brandy, the merchant who had contracted to furnish the fruit, refused to deliver it; that the ship returned to *England*; that an action was commenced against the Plaintiff by Defendants for not shipping the brandy; that the proceedings in such action were delayed by reason of the necessity of sending out a commission to *Terceira*, and the action was not finally settled at the death of the Plaintiff, which happened in 1827; that shortly after Defendants had sued Plaintiff

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for damages, Plaintiff commenced an action against Defendants for freight, and recovered a judgment for damages and costs, 418*l.* 18*s.* (a); that under this judgment *Rondeau* was taken in execution, in May 1820, by the sheriff of *Surrey*, and still remained in execution; that Plaintiff had no interest in the charter or damages, but that Messrs. *Attwood* and others were the owners and interested, and that Plaintiff acted under their orders; that Defendants relied on the delivery of the brandy, in faith of which Defendant, *Walton*, went abroad and contracted for fruit and cargo, which contract he being unable to execute for want of the brandy, a loss was incurred of 2000*l.*; that Defendants offered to Plaintiff, to allow a set-off of 418*l.* 18*s.* recovered against them out of Defendants' damages of 2000*l.*; that Plaintiff refused this, and required Defendants to release their whole claim; that Plaintiff became bankrupt in 1822, and on his examination disclaimed all interest in this action; that he was indemnified by *Attwood* and others, the owners of the ship; that his name was used for form; and that he would have liberated Defendant, but could not; that Plaintiff died intestate, and that letters of administration were granted to his widow, who disclaimed all interest in this action; that the assignees also disclaimed damages; that the Defendants were ready to allow the owners credit in account for damages; that the Defendant, *Rondeau*, was seventy-six years old, and had been confined in prison nearly eight years in this action.

Lawes cited *Parkinson v. Horlock* (b), where, after the Plaintiff's death, the Court in 1806 discharged from execution a Defendant who had been in custody ever

(a) See *Fothergill v. Walton*, brandy by *Fothergill* was not a
 8 *Taunt.* 376., in which it was condition precedent.
 holden, that the delivery of the (b) 2 *N. R.* 240.

since

since the year 1792; and *Broughton v. Martin* (a), where the same course was pursued under similar circumstances; no administration in those cases having been taken out to the respective plaintiffs, which amounted to same thing as the administratrix disclaiming an interest in the cause.

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WALTON.

Wilde Serjt., who shewed cause, distinguished those cases from the present, on the ground that there was no personal representative of the Plaintiff who could discharge the Defendants; whereas, here, the administratrix might immediately discharge the Defendant if she chose to take on herself the responsibility of doing so; and if she declined incurring that responsibility, the Court could not impose it on her.

Lawes (*E. Lawes Serjt.* was with him), referred to *Bauerman v. Radenius* (b) as establishing the principle, that a court of law will not look to the rights of parties only equitably interested, the declarations of a trustee plaintiff having been admitted in that case to defeat the action. In like manner, he urged, the disclaimer of the administratrix in the present instance ought to operate as a release to the Defendant. At all events, if the Court would on one side look to the rights of those who were equitably interested, they would consider also what was equitable for the other side; and the affidavit on which he moved sufficiently established the Defendants' claim to be discharged on good conscience, independently of his years and long imprisonment.

BEST C. J. Appeals have been made to compassion in which the Court is not at liberty to indulge. Here is a legal judgment against the Defendant, and if there

(a) 1 B. & P. 176.

(b) 7 T. R. 663.

1828.
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 WALTON.

were no person who could discharge him from it, the Court might perhaps interfere, having gone that length upon former occasions. But the Plaintiff's legal representative has full power, if she pleases, to discharge the Defendant out of custody. Ought we, then, to interfere and relieve her from the responsibility on which she detains him? We could not do so without great injustice. Since the court for the relief of insolvent debtors has been established, every honest debtor may be discharged out of custody if he will surrender his property to his creditors, and if he will not, he ought to remain. We have no discretion in the present case, and if we had, we ought not to exercise it in favour of the Defendant.

PARK J. The cases which have been cited do not apply, for in those cases the Court interfered, because there was no legal representative who could discharge the Defendant; here there is an administratrix, who has a valid judgment and power to discharge the Defendant. In *Dunsford v. Gouldsmith* (a) the Court refused to discharge a defendant after the death of the plaintiff, because there was an executor who had taken out probate, and had the power of discharging the defendant. And in that respect there is no difference between an executor and an administrator. *Baerman v. Radenius* has nothing to do with the present question.

The rest of the Court concurring, the rule was
 Discharged.

(a) 8 B. Moore, 145.

1828.

HAWKES and Others, Assignees of DAY and
Others, Bankrupts, v. SALTER.

May 17.

ACTION against the Defendant as drawer of a bill of exchange for 125*l.*, accepted by one *Calver*, payable at Messrs. *Days*, *Norwich*.

At the trial of the cause before the Lord Chief Baron, *Norfolk Summer assizes 1827*, it appeared that the bill became due on *Saturday*, the 17th of *January 1827*; that it was on that day presented at Messrs. *Days*, *Norwich*, for payment, and dishonoured; that *Calver*, the acceptor, lived within a mile of *Norwich*; that the Defendant, the drawer, lived at *Swaffield*, near *North Walsham*, about fourteen miles from *Norwich*; and that the post from *Norwich* to *North Walsham* leaves *Norwich* at half after nine in the morning. One of the Plaintiffs' clerks stated, that a letter from the Plaintiffs, which the witness had copied, giving the Defendant notice of the dishonour of the bill, was sent by the post from *Norwich* on *Tuesday morning*, the 10th of *January*, but he had no recollection whether it was put in by himself or by another clerk. It was objected, that the bill ought to have been presented to *Calver* himself; that notice of dishonour ought to have been sent by the *Monday's post*; and that at all events there was not sufficient evidence that the letter had ever been put into the post.

A verdict was found for the Plaintiffs, but the objections were reserved for the opinion of the Court, and

Storks Serjt. accordingly obtained a rule *nisi* to enter a nonsuit or a verdict for the Defendant, on the grounds above stated, against which

A bill was dishonoured on *Saturday* in a place where the post went out at half after nine in the morning: Held, that it was sufficient notice of dishonour to send a letter by the following *Tuesday morning's post*.

The holder's clerk, who copied the letter containing the notice, said, that the letter was put into the post on the *Tuesday morning*, but he had no recollection whether it was done by himself or another clerk: Held, not sufficient evidence of putting into the post.

1828.

HAWKES

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SALTER.

Spankie Serjt. shewed cause. Although by statute an acceptance at a particular place is the same as a general acceptance, and the bill might have been presented to *Calver* himself, yet if he appoints an agent to pay the bill, presentment to that agent is in law the same thing as presentment to himself. Then the Plaintiffs were, according to all the decisions, allowed a day to give notice of dishonour. They could not write on *Sunday*, for that would have been *contra bonos mores*; and they were not bound to get up at an unseasonable hour on *Monday* morning; they might write during the whole of *Monday*, and *Tuesday* morning's post was early enough, there being no post on *Monday* night. In *Bray v. Hadwen* (a), where the bankers of the holder of a bill received on a *Sunday* morning notice of its dishonour, which, they wrote to apprise the holder of, on *Monday*, but put the letter into the post after twelve o'clock at noon, at which time the mail started, so that it did not go till the next day; it was holden that they had all *Monday* to write, and that as far as they were concerned there had been no improper delay. The same point was decided in *Wright v. Shawcross*. (b)

The evidence was sufficient to go to the jury. In *Hetherington v. Kemp* (c), Lord *Ellenborough* said, "had you called the (plaintiff's) porter, and he had said that although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the (plaintiff's) table, this might have done."

It is the same thing if the clerk who copied the letter affirms that it was sent, though he does not recollect whether he or another clerk put it into the box.

Storks insisted that the bill ought to have been presented to *Calver* himself; for the words *payable at*

(a) 5 M. & S. 68. (b) 2 B. & A. 501. n. (c) 4 Campb. 192.

Messrs. *Days*, formed no part of the contract since the act of parliament which had made such an acceptance a general acceptance. At all events there was no evidence that the letter had been put into the post; the clerk called could not know what the other had done; and he had no recollection as far as concerned himself.

Upon the authority of the cases cited,

BEST C. J. Expressed himself clearly of opinion, that it would have been sufficient if the letter had been put into the post before the mail started on the *Tuesday* morning; but that there was no sufficient evidence that it had been put in, even on *Tuesday* morning.

The Court therefore granted a new trial, on payment of costs.

Rule absolute for a new trial.

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HAWKES

v.

SALTER.

PHILPOT v. BRIANT.

May 19.

ACTION by the holder against the drawer of a bill of exchange, which had been accepted by the drawer's brother. None of the counts in the declaration stated the acceptance or notice of non-acceptance.

The defence was, that time had been given by the holder to the acceptor's executrix, without the knowledge or consent of the drawer; as to which the evidence was, that the bill, which was payable six months after date, was due *March* 19. 1823; that the acceptor died before that day; that the Plaintiff applied to the acceptor's brother, the son and agent of his executrix, for payment,

If the executor of the acceptor of a bill of exchange, orally promise to pay the holder out of her own state, provided he forbear to sue, and the holder forbear to sue in consequence; the promise being

void, the drawer of the bill is not discharged by the holders having promised to give time; and having delayed to sue under such circumstances.

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v.

BRIANT.

when he said there was not sufficient personal property to pay the bill then, but that if the Plaintiff would let the matter stand over, the executrix would engage to pay the bill out of her private income. Plaintiff promised, provided the interest were paid, to give a reasonable time; and in pursuance of this agreement, interest was paid out of the private income of the executrix.

It was also objected that the declaration was insufficient, in not averring an acceptance or notice of non-acceptance.

Park J., before whom the cause was tried at the *London* sittings after *Michaelmas* term, overruled the latter objection; but upon a verdict being taken for the Plaintiff, reserved to the Defendant leave to move to enter a nonsuit on the former.

Taddy Serjt. having obtained a rule *nisi* accordingly,

Wilde Serjt., who shewed cause, argued that there was no consideration for the promise made by the executrix to pay out of her own effects; and that even if there were, it was void under the statute of frauds, as not being in writing. If the promise of the executrix were void, there was no consideration for the Plaintiff's promise to give her time; and if that promise was without consideration, it was also void. The Plaintiff was not bound by it, for he was always entitled to be paid out of the testator's assets, and obtained no better security by the executrix's promise. He might, therefore, have sued the executrix at any time notwithstanding his promise, so that in effect no time was legally given her.

Taddy. The Plaintiff's remedy against the acceptor was in effect suspended, and that is sufficient to discharge the drawer. But for the promise given by the Defendant the Plaintiff would have sued at once on the bill.

bill. The promise to pay, if proceedings were stayed, was in substance a promise to pay out of the assets; and the stay of proceedings was a sufficient consideration for such a promise. But if time was given, it is immaterial whether there was a consideration for giving it or not. In *Tindall v. Brown* (a), *Buller J.* says, "As to giving time, the holder does it at his peril. In, no case has it been determined that the indorser is liable after the holder of the note has given time to the maker." In that case there was no consideration for the time given by the holder, nor did he obtain by it any other security.

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v.
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Cur. adv. vult.

BEST C. J. A creditor by giving further time of payment, undertakes that he will not, during the time given, receive the debt from any surety of the debtor, for the instant that a surety paid the debt he would have a right to recover it against his principal. The creditor, therefore, by receiving his debt from the surety would indirectly deprive the debtor of the advantage that he had stipulated to give him. If the creditor had received from his debtor a consideration for the engagement to give the stipulated delay of payment of the debt, it would be injustice to him to force him to pay it to any one before the day given. If to prevent the surety from suing the principal, the creditor refuses to receive the debt from the surety until the time given to the debtor for payment by the new agreement, the surety must be altogether discharged, otherwise he might be in a situation worse than he was in by his contract of suretyship. If he be allowed to pay the debt at the time when he undertook that it should be paid, the principal debtor might have the means of repaying him. Before

(a) 1 T. R. 169.

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the expiration of the extended period of payment the principal debtor might have become insolvent. A creditor, by giving time to the principal debtor, in equity, destroys the obligation of the sureties; and a court of equity will grant an injunction to restrain a creditor, who has given further time to the principal, from bringing an action against the surety. This equitable doctrine courts of law have applied to cases arising on bills of exchange.

The acceptor of a bill of exchange is considered as the principal debtor; all the other parties to the bill are sureties that the acceptor shall pay the bill, if duly presented to him on the day it becomes due, and if he does not then take it up, that they, on receiving notice of its non-payment, will pay it to the holder. If the holder gives the acceptor further time for payment, without the consent of the drawer or endorsers, he discharges them from all the liability that they contracted by becoming parties to the bill: but delay in suing the acceptor will not discharge the drawers or endorsers, because such delay does not prevent them from doing what, on receiving notice of non-payment by the acceptor, they ought to do; namely, pay the bill themselves.

The time of payment must be given by a contract that is binding on the holder of the bill; a contract, without consideration, is not binding on him; the delay in suing is, under such a contract, gratuitous; notwithstanding such contract, he may proceed against the acceptor when he pleases, or receive the amount of the bill from the drawer or endorsers. As the drawer and endorsers are not prevented from taking up the bill by such delay, their liability is not discharged by it; to hold them discharged under such circumstances, would be to absolve them from their engagements, without any reason for so doing. In the case of the partners of the
Arundel

Arundel Bank v. Goble, which is to be found in a note to *Chitty on Bills*, 296, and the accuracy of which note is proved by my Brother's report to us of what passed at the trial of the cause before him, that point is decided. The acceptor applied to the holders for indulgence for some months; they, in reply, wrote to the acceptor, informing him that they would give him the time that he required, but that they should expect interest. On a motion for a new trial, the Court of King's Bench held, that as no *fresh security* was taken from the acceptor, the agreement of the plaintiffs to wait was without consideration, and did not discharge the drawer. This is a stronger case than the present. In our case there is no agreement for any particular time, nor any consideration for the giving the time that was given to the acceptor.

If the promise made by the executrix of the acceptor be considered to be a promise to pay the debt, with interest, out of the assets of the executrix, it gives no claim to the holder beyond what the bill gave him. The executrix was, before that promise was made, bound to pay principal and interest out of her testator's effects. If it is to be taken to be a personal promise of the executrix it is void under the statute of frauds, not being in writing. The holder, therefore, had no better security, nor any advantage beyond what the bill had given him. We hesitated, only, in consequence of what fell from Mr. Justice *Buller*, in *Tindall and Brown*. But in that case there was no notice by the holder to the defendant of the dishonour of the note. The opinion of *Buller* is not the ground on which the Court gave the judgment, and that opinion is overruled by the case in *Chitty*.

The rule for a nonsuit must be

Discharged.

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May 19. **MACLEAN v. DUNN and WATKINS, who survived AUSTIN.**

1. If *A.*, without authority, makes a contract in writing for the purchase of goods by *B.*, and *B.* subsequently ratifies the contract, such ratification renders *A.* an agent sufficiently authorised to make the contract under the statute of frauds.

2. Where the purchaser of goods refuses to take them, the vendor, by re-selling them, does not preclude himself from recovering damages for the breach of contract.

THIS was a special action of *assumpsit* for not accepting and paying for a quantity of *Russian* and *German* wool. At the trial before *Best C. J.*, *London* sittings after *Michaelmas* term 1826, the facts of the case as far as they are material to the questions here noticed, were as follows:—

The Defendants were carrying on business in *London* as druggists and dry-salters, when *Ebsworth*, a *London* wool-broker, met *Watkins* at *Manchester*, near which place *Watkins* lived, and on the part of the Plaintiff agreed to sell the Defendants 165 bags of *Russian* and *German* wool, to be paid for partly by 145 bags of *Spanish* wool, which, on the part of the Defendants, he agreed to sell to the Plaintiff, and partly by acceptances or cash, on certain terms specified in the following bought and sold note, which he delivered to the Plaintiff's clerk.

“ *Manchester, 28th March 1825.*

“ *D. Maclean, Esq.*

“ Sir, — We have sold for your account, to Messrs. *Dunn, Austin, Watkins*, and Co. 166 bags of *Russian* and *German* wool, viz. [here followed a specification of the wools as in the note made out for the Defendants, amounting to 165 bags only, the insertion of 166 having been admitted on the trial to have arisen by mistake in the casting,] after deducting the amount of 145 bags of *Spanish* wool sold you, the balance to be paid for by an acceptance at four months, with $2\frac{1}{2}$ per cent. discount, or in cash with 5 per cent. discount, at your option. — Commission for selling, 1 per cent.

“ *EBSWORTH and BADHAM.*”

“ *Man-*

" *Manchester*, 28th *March* 1825.

" *D. Maclean*, Esq.

" Sir, — We have bought for your account, of Messrs. *Dunn*, *Austin*, *Watkins*, and Co., 145 bags of *Spanish* wool, viz. [here followed a specification of 145 bags of wool,] the amount of 145 bags to be deducted from the 165 bags of *Russian* and *German* wool bought of you this day, and the balance to be paid for by an acceptance at four months at $2\frac{1}{2}$ per cent. discount, or in cash, with 5 per cent. discount, on the 1st *July*, at your option. — Commission for purchasing, $\frac{1}{2}$ per cent.

" *EBSWORTH* and *BADHAM*."

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This bought and sold note was written on one sheet of paper.

Corresponding bought and sold notes, *mutatis mutandis*, were made out by *Ebsworth* for the Defendants. In these notes the 1st of *July* was specified as the day for cash with discount, at the end of the sold note as well as at the end of the bought note. They were never delivered to either of the Defendants. *Ebsworth*, however, made out a memorandum of the contract in his broker's book, called a contract-book, which was not signed by him, and shewed this memorandum to *Watkins*, on the day it was entered, *March* 28. 1825.

Watkins assented to the contract, provided *Dunn*'s consent could be obtained. *Ebsworth* had had no previous communication with *Dunn*, but saw him about the beginning of the next month, when, as *Ebsworth* swore at the trial, *Dunn* assented to the bargain, and said he was perfectly satisfied with what was done.

On the 19th of that month *Dunn* told *Ebsworth* he would have nothing to do with the contract, which *Ebsworth* communicated to the Plaintiff.

Plaintiff, nevertheless, in *May* addressed the Defendants collectively on the subject of the delivery of the wool, when *Watkins* wrote and referred him to *Ebsworth*,
who

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who afterwards, with the assent of *Watkins*, and in the name of the Defendants collectively, sold and delivered sixty-eight bags of the *German* wool to *Williamson* and *Jones*.

In *July* the Plaintiff transmitted the invoice of the 165 bags of wool to *Manchester*, addressed to the Defendants, and requested payment of what was due to him.

In *September* he requested them to receive and pay for the remainder of the wools undelivered, and gave notice, that unless the account between him and the Defendants were liquidated by the 1st. of *November*, the wool remaining undelivered would be put up to public sale on that day, and the Defendants held responsible for any loss.

The Defendants having declined to receive them they were sold at a loss; whereupon the present action was commenced.

It was objected at the trial, on behalf of the Defendants, that there was no valid contract between the parties, the broker's book not having been signed, and the bought and sold notes not having been delivered to each party; that *Ebsworth* having no authority from *Dunn* at the time of the bargain, was not an agent authorized within the meaning of the statute of frauds; that the bought and sold note given to the Plaintiff varied from that made out for the Defendants, the latter specifying the 1st of *July* as the day for cash with discount, at the end of the sold as well as of the bought note; the former specifying that day only at the end of the bought note; and that the Plaintiff had rescinded the contract, by the delivery of part of the wool to *Ebsworth*, and the sale of the remainder.

A verdict was taken for the Plaintiff, with leave for the Defendants to move the Court upon these points.

Taddy Serjt. accordingly obtained a rule *nisi* to enter
a non-

a nonsuit or have a new trial, on these and sundry other questions of law and fact.

With respect to the alleged variance, the Court held, that as the Plaintiff's bought and sold note was all written on the same sheet of paper, the 1st of *July*, specified at the end of the bought note, must be taken to apply equally to the contract in the sold note, and that therefore the instrument corresponded sufficiently with the bought and sold note made out for the Defendants.

If the subsequent ratification by *Dunn* constituted *Ebsworth*, by relation, an agent duly authorized within the meaning of the statute of frauds, at the time of the contract, a bought and sold note having been made out and signed by him on the part of the Defendants, his delivering it to them and his signing the contract-book would not be essential to the validity of the contract:

It is only necessary, therefore, to report what was said on the points, Whether a person who makes a contract for another, without due authority, becomes, on the ratification of the contract by the party to be charged, a sufficient agent to bind him, within the meaning of the statute of frauds, and Whether the disposal by the vendor, of goods sold, with a view to prevent further loss upon the vendee's refusing to receive them, be a rescinding of the contract.

Wilde and *Russell* Serjts. for the Plaintiff. The statute of frauds does not affect the principle which regulates contracts made by an agent, with respect to which a subsequent ratification is equivalent to a previous authority. Here there was not only such a ratification, but the case is taken out of the statute by a delivery of the goods. Bulky goods need not all be delivered at the same time, but according to convenience, and any unequivocal act of control over the portion delivered, is equivalent to a delivery and acceptance of the whole:

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Chaplin v. Rogers. (a) In *Hinde v. Whitehouse* (b), even a constructive delivery by samples was held to vest the property in the buyer, and sufficient to satisfy the statute; and from acts of assent, an authority might be presumed: *Ward v. Evans.* (c) Merely acting on the agent's order was sufficient for that purpose: *Kinnitz v. Surry.* (d) With regard to the resale, it would not prevent the Plaintiff from recovering damages for non-performance of the contract, though, perhaps, it might be an answer to an action for goods sold: *Hagedorn v. Levy.* (e) In *Greaves v. Ashlin* (f), where it was holden that the contract had been rescinded, the vendor resold the goods within a few days after he had sold them, although the purchaser had never refused to carry the contract into execution.

Taddy and Spankie Serjts. contra. Admitting the maxim, *omnis ratihabitio mandato æquiparatur*, under the statute of frauds the *mandatum*, where there is no delivery of the goods, must be in writing. A ratification cannot make a signature.

But the resale rescinded the contract at all events, and deprived the Plaintiff of any right to sue. *Greaves v. Ashlin* cannot be distinguished from the present case. In that case there was a written contract for the sale of goods; no time was specified for the delivery; but although the purchaser had notice, that unless they were taken away they would be resold, it was held he had no right on that account to resell them.

BEST C. J. It has been argued, that the subsequent adoption of the contract by *Dunn* will not take this case out of the operation of the statute of frauds; and it has

(a) 1 East, 192.

(b) 7 East, 558.

(c) Salk. 442.

(d) Paley, Pr. & Ag. 143. note, 2d edit.

(e) 6 Taunt. 162.

(f) 3 Campb. 425.

been

been insisted, that the agent should have his authority at the time the contract is entered into. If such had been the intention of the legislature, it would have been expressed more clearly; but the statute only requires some note or memorandum in writing, to be signed by the party to be charged, or *his agent thereunto lawfully authorised*; leaving us to the rules of common law, as to the mode in which the agent is to receive his authority. Now, in all other cases, a subsequent sanction is considered the same thing in effect as assent at the time. *Omnis ratihabitio retrotrahitur et mandato æquiparatur*: and in my opinion, the subsequent sanction of a contract signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes. But in *Kinnitz v. Surry*, where the broker, who signed the broker's note upon a sale of corn, was the seller's agent, Lord *Ellenborough* held, that if the buyer acted upon the note, that was such an adoption of his agency as made his note sufficient within the statute of frauds: and in *Soames v. Spencer (a)*, where *A.* and *B.*, being jointly interested in a quantity of oil, *A.* entered into a contract for the sale of it, without the authority or knowledge of *B.*, who, upon receiving information of the circumstance, refused to be bound, but afterwards assented by parol, and samples were delivered to the vendees; it was held, in an action against the vendees, that *B.*'s subsequent ratification of the contract rendered it binding, and that it was to be considered as a contract in writing within the statute of frauds. That is an express decision on the point, that under the statute of frauds

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(a) 1 Dow. & Ry. 32.

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the ratification of the principal relates back to the time when the agent made the contract.

Then, with regard to the resale, it seems clear to me, that it did not rescind the contract. It is admitted that perishable articles may be resold. It is difficult to say what may be esteemed perishable articles, and what not: but if articles are not perishable, price is, and may alter in a few days, or a few hours. In that respect there is no difference between one commodity and another. It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it, except on the authority of decided cases. Those which have been cited do not apply. Where a man, in an action for goods sold and delivered, insists on having from the vendee the price at which he contracted to dispose of his goods, he cannot, perhaps, consistently with such a demand, dispose of them to another; but if he sues for damages in consequence of the vendee's refusing to complete his contract, it is not necessary that he should retain dominion over the goods: he merely alleges that a contract was entered into for the purchase of certain articles, that it has not been fulfilled, and that he has sustained damage in consequence. There is nothing in this which requires that the property should be in his hands when he commences the suit; and it is required neither by justice, nor by the practice of the mercantile world.

In actions on the warranty of a horse, it is the constant practice to sell the horse, and to sue to recover the difference. The usage in every branch of trade is equally against the objection which has been raised on the part of the Defendants. It is urged, indeed, that in contracts entered into by the *East India Company*, the power of resale is expressly provided for, in case the vendee should refuse to perform his contract.

That

That is only *ex abundanti cautela*, and it has never been decided that a resale of the goods is a bar to an action for damages for non-performance of a contract to purchase them: the contrary has been held at *Nisi Prius*. But, without referring to a *Nisi Prius* case as authority, we are anxious to confirm a rule consistent with convenience and law. It is most convenient that when a party refuses to take goods he has purchased, they should be resold, and that he should be liable to the loss, if any, upon the resale. The goods may become worse the longer they are kept; and, at all events, there is the risk of the price becoming lower.

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Rule discharged. (a)

(a) *Park J.* took no part in the hearing or decision of the case.

(IN THE EXCHEQUER CHAMBER.)

LUCAS, THOMPSON, DAVIS, BULL, T. LINGHAM, *May 17.*
and EICKE, v. NOCKELLS.

ERROR on a bill of exceptions.

Nockells, the Plaintiff below, declared in trespass for breaking and entering his ship, making a noise and

Plaintiff, a ship-owner, agreed by charter-party with *T.* to

take any goods on board which *T.* should ship, and convey them from *Van Diemen's Land* to *London*. *T.* covenanted to pay freight at the rate of 15*s.* per ton per month, ten days after the delivery of the cargo, and then consigned a cargo to Defendants by a bill of lading, under which they or their assigns were to pay freight as per charter.

T., being indebted to Defendants, they, on the arrival of the ship in *London*, sued out a writ of *fi. fa.*, and took the cargo forcibly from the ship, exhibiting the sheriff's warrant to the captain: they did not sell under the *fi. fa.*, but afterwards made affidavit at the custom-house that they landed the cargo as the importers.

Plaintiff having sued them in trespass for entering his ship and taking the cargo, and to a justification under the writ, having replied *de injuriâ absque residuo causæ*, and having new-assigned that the Defendant took the goods for other purposes than those mentioned in the pleas, Held, that it was competent to the Judge to leave it to the jury to say, whether the goods were *bonâ fide* taken under the execution, or whether the execution was resorted to as a colour to enable the Defendants to get possession of and land the cargo as importers, without subjecting themselves to the claim or question that might have arisen if they had accepted them under the bill of lading.

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disturbance in it for two days, breaking open the hatches, entering the hold, and taking a large quantity of oil, whalebone fins, hides, &c. in the possession of the Plaintiff below, on board the ship, and on which he had a lien to the amount of 6000*l.* for freight, due to him as owner of the vessel, and for carrying away and converting the goods to their own use, whereby Plaintiff below was deprived of his lien, and lost his freight.

Second count, for taking possession of his ship and goods.

Third, for taking out of a certain other ship the goods of the Plaintiff below.

The Defendants below (*Lucas and Thompson* jointly, and the others severally) justified the trespass under a judgment recovered in the Court of King's Bench, by *R. Hopley, G. H. Lingham, and T. Lingham*, against one *Nathaniel Thornton*, for a debt of 20,000*l.* and costs, upon which a *testatum f. fa.* was sued out, directed to the sheriff of *Middlesex*, and indorsed to levy 6000*l.* besides expenses, which writ was delivered to *Lucas and Thompson*, sheriff of *Middlesex*, to be executed, who made out their warrant in writing to *Davis and Bull*, commanding them that of the goods and chattels of *Thornton* they should cause to be made the debt and costs aforesaid. It was then averred, that at the time when, &c. there were divers goods and merchandizes belonging to *Thornton* on board the ship in the declaration mentioned, and that *Davis and Bull* being bailiffs (assisted by *T. Lingham and Eicke*), before the return of the writ, entered into the ship, seized *Thornton's* goods and merchandizes, sold them, and by the sale made and levied the amount of 1950*l.* towards satisfaction of the debt and costs aforesaid.

The Plaintiff below replied that the Defendants below of their own wrong, and without the residue of the
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cause by them in their plea alleged, committed the said trespasses.

He also new-assigned that the Defendants below, for other purposes than those mentioned in the pleas, entered the ship, and took the goods, and that more violence was resorted to than was necessary. Upon all which issue was joined.

At the trial before Lord Tenterden C. J., *London* sittings after *Trinity* term 1826, it appeared, that the Plaintiff below was owner of the ship *Emerald*; that by a charter-party of the 8th *August* 1822, executed at *Port Jackson, New South Wales*, by the son of the Plaintiff below, under a power of attorney, (and reciting a former charter-party of *April* 1821, by which the Plaintiff below did grant, and to freight let, and *Nathaniel Thornton* did hire and take to freight all the said ship *Emerald* for the term of a year from *May* 1st, 1821, with an agreement that if the ship should be employed more than a year, she should be paid for at the rate of a guinea per ton per month, reciting, also, that the parties had agreed and did agree to put an end to and determine that charter-party and enter into a fresh one), the Plaintiff below and *William Elliott*, the master of the ship, jointly and severally covenanted with *Nathaniel Thornton* as follows, that is to say, "that the ship should be made ready and fitted, and should take on board all such goods as *N. Thornton* should tender to *William Elliott*, and should with all convenient dispatch proceed" with her cargo to *London*, and should discharge at *London*, to *Thornton* or his assigns; *Thornton* covenanting to pay "freight at the rate of 15s. per ton per month," ten days after the delivery of the cargo.

Under this charter-party, a cargo of oils, furs, hides, &c. was shipped by *Thornton*, at *Van Diemen's Land*, for *London*, and *Elliott* signed a bill of lading, by which this cargo was to be delivered to Messrs. *Hopley* and *Linghams*, or their assigns, "he or they paying freight

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for the same as per charter, with primage and average accustomed."

In June 1823, the ship arrived at *Gravesend*, when *G. H. Lingham* went on board, and after enquiring about the cargo, and receiving letters from *Thornton*, said he wished the ship to go to *Brewer's Quay*; the Plaintiff below insisted on going into the *London Docks*, but after shewing *Lingham* the ship's manifest, by which the goods were consigned to *Hopley* and *Linghams*, agreed that the ship should go to *Brewer's Quay*, if *Hopley* and *Linghams* would pay freight for the cargo according to the first charter-party. The Plaintiff below afterwards offered to take freight at the lower rate mentioned in the second charter-party, but *Lingham* made no answer. After the ship had been reported at the custom-house, Plaintiff below informed *Hopley* of that circumstance, and offered to deliver the cargo where *Hopley* and *Linghams* pleased, if they would agree to pay the freight; but *Hopley* said he would give no promise, and after some altercation, said to the Plaintiff below, "I will make something of you before I have done with you." On the 3d of July, *Hopley* and *Linghams*, who were creditors of *Thornton* to a considerable amount, issued the *fiery facias* mentioned in the declaration, *Thornton* being in embarrassed circumstances; and on the 4th, *T. Lingham*, accompanied by *Eicke*, his attorney, and *Bull* and *Davis*, the sheriff's officers, entered the ship with the sheriff's warrant, which they exhibited to the Plaintiff below, and although required by him to leave the ship, broke open the hatches, which had been closed to prevent them from taking the cargo, and proceeded to unload it from that time to the 17th, by which day the whole was unloaded. When the sheriff's officers came on board, the captain of the ship told the Plaintiff below he thought he was wrong in detaining the cargo, as the freight was not due till ten days after the delivery; Plaintiff below said, "He'd

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be damned if he cared," and ordered the captain not to allow the cargo to be taken. The captain had signed three bills of lading, one of which he gave to the Plaintiff below, and left the other two with *Thornton*. *Hopley* and *Linghams* indemnified the sheriff, and it was proved that *Davis* had said the sale of the cargo taken out produced 1950*l*.

On the 4th *July* *Hopley* and *Linghams* presented a memorial to the commissioners of customs, as follows:—
 "Honourable Sirs, — We have in the ship *Emerald*, from *New South Wales*, 260 casks of train oil, which we have paid duty on, and are desirous of landing at the legal quays."

On the 10th *July*, the captain of the ship made affidavit at the custom-house that the cargo (describing it) was *British* property, and to this affidavit was annexed another, as follows:—

"*Thomas Lingham*, for self and Co., importers, maketh oath that the within-mentioned cargo is *British* property."

On the 7th of *August*, *Hopley* and *Linghams* annexed to a catalogue of the cargo for sale by auction, a certificate that the lots had been imported within twelve months; had not been previously sold or parted with; and that that was the first sale.

They also addressed a note to the auctioneer as follows: "We appoint you to buy for our account this day the following goods, at the prices annexed, being our property." This was concluded by a description of the cargo. These two latter instruments were left by *Hopley* and *Linghams* at the excise-office, and the cargo was put up to sale by auction, under their direction, on the 7th of *August*.

The Chief Justice charged the jury that he was of opinion that the possession of the ship was in the Plaintiff below at the time of the execution, and that the question for their consideration was, whether the goods

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were really and *bond fide* taken by virtue of the said writ of execution; if they were, the verdict ought to be for the Defendants below; or, whether the execution was had recourse to merely as a colour to enable the Defendant *Lingham*, and his partners, who were the consignees, to take said goods, and so get possession of them, and land them as importers, without subjecting themselves to the claim or question that might have arisen if they had accepted them under the bill of lading; in which latter case the verdict ought to be for the Plaintiff below. Whereupon the counsel on the part of Defendants below objected, first, that the question proposed by the Chief Justice for the consideration of the jury was not open for their consideration upon the pleadings in the cause; for if there was ground for imputing fraud, it ought to have been specially replied; and, secondly, that none of the counts mentioned in the declaration had been proved, and that the Chief Justice ought to direct the jury upon the evidence so produced as aforesaid, that the possession of the said ship was not at the time of the entering the same by Defendants below, by law vested in the Plaintiff below, and that the Plaintiff below had no lien on the said goods, and, consequently, that Plaintiff below was not competent to maintain the action. Upon these objections a bill of exceptions was tendered and signed, and the jury gave their verdict for the Plaintiff below, with damages 1950*l*.

Three points were proposed for argument in this case.

First, Whether the Plaintiff below, notwithstanding the charter-party, had still sufficient possession of the ship to maintain an action of trespass.

Secondly, Whether he had a lien on the goods seized in respect of which he could sue in trespass for an illegal seizure of them.

Thirdly, Whether upon the pleadings in this cause it was competent to the Lord Chief Justice to leave it

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to the jury to say, whether the goods were *bonâ fide* taken under the writ of execution, or whether the execution was resorted to as a colour for taking them, not to effect a levy by virtue of the execution, but with a view to land them without subjecting the Defendants below to the claim of the Plaintiff below for freight.

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F. Pollock for the Defendants below admitted that the Plaintiff below had, notwithstanding the charter-party, sufficient possession of the ship to maintain trespass for nominal damages against wrong-doers: *Saville v. Champion* (a), *Christie v. Lewis* (b): and the second point, therefore, touching the lien, was only argued with a view to the reduction of damages in case the third should be decided against the Defendants below. He contended that the Plaintiff below had no lien, because the freight, according to the terms of the charter-party, was not payable till ten days after the delivery of the goods, and a stipulation for dealing on credit is destructive of a right to lien: *Hutton v. Bragg*. (c) In *Raitt v. Mitchell* (d), where a shipwright in the *Thames* had taken a ship into his dock to repair without any express agreement for immediate payment, credit being given by the usage of the trade to the owner of the ship in such cases, Lord *Ellenborough* held the shipwright had no lien.

But, thirdly, the Defendants below were not wrong-doers. It is admitted on the pleadings that the goods seized belonged to *Thornton*; that *Thornton* was indebted to *Hopley* and *Linghams*; and that *Hopley*, *Lingham*, and the sheriff's officer, when they seized the goods, were armed with a writ of execution, under which they were authorized to seize them for a debt due to *Hopley* and *Linghams*. That was a sufficient warrant for what they did; and the motive with which they acted was


(a) 2 B. & A. 503.

(b) 2 B. & B. 410.

(c) 7 Taunt. 14.

(d) 4 Campb. 146.

immaterial,

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immaterial, and could not be traversed. As the existence of the writ was not disputed, and as its efficacy could not be disputed, the jury had no authority to enquire into the intentions of the parties who were authorized to carry it into effect. Their province was to deal with facts, not with intentions; and even if the Defendants below had avowed other motives for the seizure besides the execution of the writ, such a declaration would not have affected the validity of their proceedings under the writ. In *Crowther v. Ramsbottom* (a), to an action of trespass for taking three cows, keeping them four days, and converting them to the defendants' use, the defendants pleaded a seizure under a writ of *justicies* to compel plaintiff's appearance in a county court, and that the plaintiff having appeared, the cattle were re-delivered to him: the plaintiff, admitting the writ of *justicies*, replied that the defendants, of their own wrong, took and detained the cattle as alleged in the declaration. At the trial it appeared to be the practice of the county court to seize any small chattel to compel an appearance, and to return it upon the party's paying 2s. 4d., which was considered as an appearance, and entered as such. *Ramsbottom* when he seized, said he was come for the cows, for 7l. debt, and 5l. costs, and though 2s. 6d. was tendered the same day, and restoration of the cows demanded, they were kept for four days. It was left to the jury to say whether the defendants entered for the purpose of compelling an appearance, or of compelling the payment of debt and costs; and a verdict having been found for the plaintiff, a new trial was granted, Lord *Kenyon* saying, "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can shew that he had a legal justification for what he did, that is sufficient. A man may distrain for rent, and

(a) 7 T. R. 654.

avow for heriot service. Now, here it appears that the Defendants were justified under the process of the county court in entering upon the Plaintiff and taking his goods in order to compel an appearance; and, therefore, the question ought not to have been left to the jury to say whether they entered for that or some other cause."

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If it was improper in that case to leave it to the jury to say, whether the Defendants had entered for the purpose of compelling an appearance, or of compelling the Plaintiff to pay debt and costs, it was equally incorrect in the present, to leave it to them to say whether the Defendants below had entered for the purpose of executing the writ, or of employing it colourably, for the purpose of landing the goods without being liable to the claim for freight. If they were armed with sufficient authority for seizure, the purpose or motive with which they seized is immaterial. In *Ex parte Wilbran (a)*, the Vice-Chancellor said, "Courts of justice have no concern with the motives of parties who assert a legal right." And the case of *Dr. Grenville (Groenvelt) v. The College of Physicians (b)* is directly in point. In trespass against *J. S.*, for an assault and wounding, and false imprisonment, the Defendant, as to the force and arms and wounding, pleaded not guilty; and as to the residue of the trespass, he justified it under the authority of the college, for malpractice by the plaintiff, in his profession of a physician. The plaintiff replied, that the defendant *de injuriâ*, &c. made the assault *absque hoc* that he did it by the authority set forth in the plea; and upon demurrer the replication was held ill: and *Holt C. J.* said, "Suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one;

(a) 5 *Maddox*, 1.

(b) 12 *Mod.* 386.

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for it is not what he declares, but the authority which he has, is his justification." In like manner, a party may distrain for one thing and avow for another: 3 Rep. 26.

From all this, it follows, that where a party has a legal authority on which he is entitled to act, as a judgment, writ, and warrant, the jury cannot be directed to find that the act of the parties was *alio intuitu*. A *virtute cuius* cannot be traversed. The sheriff or his officer cannot be told that they have not entered by virtue of that writ which expressly gives them authority to enter. To question such authority would paralyse the whole power of the laws. It is no answer to one who has a right to sue in a civil action, or to prosecute for a felony, to say, that he is actuated rather by malice than by a view to his own interest or the public good. It is sufficient that he has the legal right; and if his motive for enforcing it were to be questioned, the law would be the occasion rather of vexation than security.

Campbell contra: (having abandoned the claim in respect of lien :) There is no traverse here of motive or intention; nor was the question of motive left to the jury, but simply, Whether the goods were *bonâ fide* taken under the execution. It is admitted, that the Defendants below were armed with the authority of the writ, and that they might, if they pleased, have taken the goods under that authority; but the traverse is of a matter of fact, namely, that though furnished with the writ they abandoned it, and did not act under it. Whether this were so or not, and whether they so unlawfully conducted themselves as to become trespassers *ab initio*, may be easily collected from their conduct, and was a fact proper for the consideration of the jury. If they had acted under the authority of the writ, they would have done what the writ required, namely, have proceeded
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to levy the debt, and to obtain the best price for the debtor by a sale of the goods. If, instead of doing this, they act in a different manner, it becomes a question of fact whether they are acting under the authority of the writ, or whether they have abandoned the writ, and are pursuing their own purposes. Supposing they had thrown the goods into the river, or, if the goods had been eatables, had eaten instead of selling them, could such conduct have been said to be a taking under the writ? It is clear, that though the Defendants below *have* the writ, they may neglect or refuse to act under it; and that is the *fact* which the jury may be directed to consider. Here the goods, instead of being sold, or of being handed to *Hopley* and *Linghams* as purchasers under the *fiery facias*, are handed to them as consignees; a fact which is indisputably established by *Lingham's* affidavit that the goods were landed by him and *Hopley*, not as execution creditors, but as importers. The whole is a palpable fraud, to enable *Hopley* and *Linghams* to elude the Plaintiff below's claim for freight, under colour of taking the goods by an execution. Where process of law is the engine by which fraud is to be effected, the courts are no more prevented from enquiring into the fraud, than where any other engine is resorted to, and there would have been no means of investigating it in the present instance, if the Plaintiff below were estopped from denying that the goods were taken under the execution. In the cases cited, the process was acted on *bonâ fide*. *Crowther v. Ramsbottom* establishes, that if a man really act under a legal authority, he is justified, although he says he comes for another purpose. But the present case is the converse of that; the Defendants below were *not* acting under the legal warrant, although they say they were.

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Pollock in reply. It cannot be said there was any fraudulent intention to deprive the Plaintiff of his freight; for it is not clear that he was entitled to freight; that belonged to the charterer, *Thornton*, and the Plaintiff below had only a claim against him under the charter-party for the hire of the ship: *Moorsom v. Kymer*. (a) If persons who execute legal process proceed irregularly, as, by destroying instead of selling, the goods taken, that is a matter for which the parties injured by the irregularity may obtain redress by application to the court out of which the process issues; but proof that an execution has been irregularly conducted is not proof that the goods seized were not seized under the writ. If the party has the writ when he seizes, and the writ authorizes a seizure, it is impossible to say the goods are not taken under the writ; though the conduct of the parties subsequently to the seizure may be such as to call for reprehension. Here there was no cause of complaint but the irregularity of handing the goods over to the creditor immediately, without the formality of a sale. If it were proposed to impute fraud to the Defendants below, fraud ought to have been replied. As the pleadings stand, the validity of the seizure under the execution cannot be disputed.

BEST C. J. The bill of exceptions raises three questions for our decision. First, Was it competent to the Chief Justice, in this cause, to leave it to the jury to say, whether the goods were really and *bona fide* taken by virtue of the writ of execution, or whether the execution was had recourse to, merely as a colour to enable the Defendants, *Hopley* and *Lingham*, to get possession of and land the goods as importers, without subjecting themselves to the claim that might have arisen, if they

(a) 2 M. & S. 393.

had accepted them under the bill of lading? Secondly, Whether the Plaintiff had such possession of the ship as would enable him to maintain trespass? Thirdly, Whether the Plaintiff had any lien on the goods for the freight due for bringing them from *Van Diemen's Land* to *London*? The counsel for the Defendants below very properly declined arguing the second question.

The charter-party, by which the ship was let to freight, contained no terms conveying to the charterer the possession of the ship. It was a covenant, that the master would bring in her all the goods that she was capable of carrying. As the freight, by the bill of lading, was made payable according to the terms of the charter-party, and as by the charter-party no freight was due until ten days after the delivery of the cargo, we think that the Plaintiff below had no lien on the cargo for the freight. But although the Plaintiff below had no lien, and although *Hopley* and *Linghams* were entitled to have the cargo delivered to them under the bill of lading, yet they had no right to take it by force, without producing the bill of lading, and so avoid acceding to the condition on which the cargo could be claimed under the bill of lading, namely, that of becoming responsible for the payment of the freight, according to the terms of the charter-party. The special property which the Plaintiff below had in the cargo was sufficient to support an action of trespass against those who took it from him without authority from the owner.

The circumstance of the Plaintiff below having no lien could only operate in reduction of the damages, and this was not the ground on which the Chief Justice's direction was excepted to. But the want of lien in the Plaintiff below, as the freight would have become due from *Hopley* and *Linghams* in ten days after they had taken the cargo, if they had claimed it under the bill of lading, could not have had such an effect on the amount
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of damages as to render it proper to send the case to another trial.

The exception, on which the first question is raised, was applied to the pleadings in the cause; but the counsel for the Defendants below has insisted in his argument before this Court, that as the Defendants below had a writ which would justify their entering the ship and taking the cargo, it would not have been competent to the Chief Justice, whatever pleadings had been on the record, to direct the jury to enquire whether the Defendants below did the acts complained of under the authority given to them by that writ. In other words, that the Defendants below having authority to do what they did, that authority will protect them, although they did not act under it. Perhaps, if the writ had given them authority to do all that they did, we could not, without overruling some decided cases, hold that the jury might enquire whether they were acting under the writ; but it will be found that the writ of execution did not justify the conduct of the defendants below; this writ, therefore, could not protect them. The action was maintainable, whether they entered the ship under the authority of the writ or not, if the writ did not justify them in disposing of the cargo in the manner in which it was disposed of by them. Although they did enter the ship under the writ, yet if they dealt with the cargo in a different manner from that in which the writ required them to deal with it, they were themselves trespassers *ab initio*. Reason, as well as law, says, that a party who abuses an authority, shall not protect himself by it. In the case of *Dye v. Leatherdale* and *Simpson (a)*, the plaintiff complained that the defendants took a certain hog, drove it away, and converted it to their own use. The defendants justified, that they took the hog damage-feasant, and

(a) 3 Wils. 26.

impounded it. The plaintiffs replied, that, after taking and impounding the hog, the defendants *converted it to their own use*. The Court held the replication good, because, when the defendants had shewn that the taking and impounding were lawful, it became necessary to re-assert the converting and disposing to their own use; for by that, the Judges say, the defendants made themselves trespassers *ab initio*. In *Reid v. Harrison* (a), which was an action of trespass for taking goods, the defendants justified under an attachment; it appearing on the plea that they continued in possession of the plaintiff's premises from the 17th day of July 1775 to the 10th January 1776; the Court said "that, by not removing the goods, and by continuing so long on the plaintiff's premises, although they entered under the writ of attachment, they had made themselves trespassers *ab initio*." So, in the present case, if the Defendants below had a writ that would have justified them in entering the ship, seizing the cargo, and selling it to raise the money to pay the debt to levy the amount of which the execution was levied, yet, if they did not deal with the property according to the exigency of such a writ, but in a different manner, and thereby occasioned an injury to the Plaintiff below, he might well say, "It is true that you had a writ, but you did not do what that writ commanded you, but dealt with the goods in a manner very different from that which the writ directed, and, therefore, you are trespassers;" this he has said by traversing all the plea except the judgment and writ.

By his new assignment, he says, in effect, "Although you had a writ, you did not enter the ship under it." Upon these pleadings it was for the jury to enquire whether the Defendants below were acting under the

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(a) 2 Bl. 1218.

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writ, or whether they obtained the writ to give a false colour to their conduct.

It has been argued before us, that motives are not examinable, and that the allegation, in pleas, of *virtute cuius* is not traversable. If a man has done what he is justified in doing, and no more, the law, in many cases, will not permit his motives to be enquired into: as if he has a right to prosecute for a crime or to arrest for a debt, there can be no enquiry with what motives these acts are done: but if he does more than as a prosecutor or creditor he had a right to do, he will not be justified, and it becomes proper to enquire whether the prosecution and arresting were not mere pretences. Such an enquiry is material for the purpose of getting at the real nature of the transaction, and enabling a jury to award proper damages. The *virtute cuius* is sometimes a mere inference of law, as, What is the meaning of a writ, or the extent of authority given by it? In such cases a question of law is raised, and there can be no traverse, for that withdraws the consideration of law from the Judges, and presents it to the jury. But the *virtute cuius* sometimes raises a mixed question of law and fact; and when this is the case, there may be a traverse, for that is the only mode by which the facts are to be settled on which the law depends. In *Beal v. Simpson* (a), *Powell J.* says, "When a matter of law only is comprised in a *virtute cuius*, then it is not traversable. But matter of fact in the *virtute cuius* is traversable." *Trehy C. J.* differed from *Powell* on this point, and said, *By virtue of the writ*, meant, by authority of the writ, by an operation of law on the writ, without any ingredient or mixture of matter of fact. The other Judges agreed with *Powell*, and said, when the *virtute cuius* is mixed with fact, it may be traversed. It ap-

(a) 1 *Ld. Raym.* 410.

pears from 1 *Saund.* 23., that *virtute cuius* may be traversed, and he refers in support of this opinion to *Hob.* 52. and 9 *Hen.* 6., 14. & 20. The learned editor, Mr. Serjeant *Williams*, says, "When the words *virtute*, *prætextu*, *per quod*, &c. introduce a consequence from the preceding matter, they are not traversable. But matter of law connected with fact, or rather matter of right resulting from facts, is traversable." In *The Grocer's Company v. The Archbishop of Canterbury* (a), Lord Chief Justice *De Grey* says, in giving the judgment of the Court, "Law connected with fact is clearly traversable."

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In this case the Plaintiff below does not, by his replication and new assignment, deny the motive with which the writ of execution was executed, or raise any question as to the import of the writ; but says, "Although you had a writ, you did not use it; you did not enter under the writ, and I deny what you have asserted in your plea, that you sold the goods and levied the debt by such sale, and paid the money so levied to the other Defendants, who caused the writ to be issued: on the contrary," says the Plaintiff below, "*Hopley and Lingham* took the goods as indorsees of the bill of lading, and they have made their sheriffs the instrument to give the transaction the colour of an execution, that they might get the goods without paying the freight, and oblige the Plaintiff below to seek his remedy against a charterer, who may be out of the reach of our law, or may be insolvent." These are facts. These were to be submitted to the jury: not with what motives the writ was executed, but whether it *was* executed.

It is not necessary for us to decide what would have been the effect on the claim of the Plaintiff below for freight, if the goods had been sold under the execution.

(a) 3 *Wils.* 234.

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If they were not taken and sold under the execution, he has a right to take advantage of it, and to obtain from the real Defendants the freight which is justly due from them to the Plaintiff below.

In this case the Plaintiff below complains that the Defendants below took his goods and *converted and disposed of them to their own use*. The Defendants below say that *Hopley and Lingham* had a judgment against the consignor and owner of the goods; that on that judgment they issued a writ of *testatum fieri facias*, by which the Defendants, the sheriffs, were commanded that of the goods of the consignor they should cause to be levied the debt and damages due under the judgment, and have the money so levied before our lord the king at *Westminster*; that the sheriffs made their warrant under that writ to the Defendants, the officers; that they entered and took the goods in execution; that the sheriffs sold them, and by the sale levied 1950*l.*; and that they paid the 1950*l.* to *Hopley and Lingham*, in part satisfaction of their debt.

The substance of the replication is, Although it is true there was such a judgment as is pleaded, although a writ was sued out, the Defendants below did not enter the ship to execute that writ. They did not proceed to sell the goods, as they say they did. They did not levy the money and pay it to the Plaintiffs in the execution; but the goods were taken under another authority, and for a purpose different from that of levying the money due to the judgment creditor. In the new assignment the Plaintiff below says, that the Defendants below, for *other purposes than those mentioned in the pleas, entered the ship and took the goods*. If the question can be raised, whether the goods were taken under the bill of lading or under the writ, these pleadings are calculated to raise it. These put that question directly in issue. The question is not raised by an inference of law, from the writ only, but from facts.

facta. If the sheriffs' officers had a warrant, but instead of preceeding to dispose of the goods according to the directions in the warrant, they took the goods, intending to keep them for their own use, might not that be shewn by their conduct with regard to the goods, and subsequent to their taking them? Certainly it might.

In this case, the manner in which these goods were disposed of after they were taken, shews as plainly that they were not seized under the writ, as if the officers who took them had kept them for their own use. Instead of being sold by the sheriff, and any debt being levied by the sale, they were handed over to *Hopley* and *Lingham*. *Hopley* and *Lingham*, instead of taking the goods as purchasers from the sheriff, tell us by their whole conduct, and most distinctly by their oaths, that they obtained the goods as importers. In such a case, is not the *virtute cuius* a mixed question of law and facts, and so, according to the authorities that I have referred to, traversable? Is it consistent with common sense, to say, that although some of the Defendants below have sworn they were the importers of the goods, and held themselves out as having the goods as importers, and in no other character, yet, because they had a writ of execution against the consignor, if they dare to state on the records of a court of justice, that they possessed themselves of them by virtue of that writ, they cannot be contradicted, but that to defeat justice their plea must be taken to be true, although negatived by their conduct; although shewn to be false by the oaths of some of those who pleaded it?

It is proper to take notice of the cases that have been cited by the counsel for the Defendants below. The first that was mentioned was *Crowther v. Ramsbottom*. In that case the defendants were authorised, by the writ of *justicies*, to do all that they were charged to have done. They were empowered to attach the Plaintiff

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by his goods, to compel an appearance. They did no more, for the property taken was returned on the Plaintiff's entering an appearance.

If they used too much violence, that should have been new-assigned; and if they took more property than it was necessary for them to take, that, as Lord *Kenyon* says, only rendered them liable to an action on the case on the statute of *Marlbridge*, but did not make them trespassers. Lord *Kenyon* says, "If he can shew that he had a legal justification for *what he did*, that is sufficient. A man may distrain for rent, and avow for heriot service."

In the case before us, the writ does not justify all that the Defendants below have done. In the language of Lord *Kenyon*, it is not a legal justification for *what they have done*; on the contrary, the conduct of the Defendants below is so unlike the conduct required by the writ, that the Plaintiff below has a right to say, *what was done could not be done in execution of the writ.*

In the case of the distress mentioned by Lord *Kenyon*, it is precisely the same thing to the party distrained on whether the distress was for rent or heriot service, if the property was taken as a distress, and treated as the law requires that property so taken should be treated. In the present case, the property was not treated as it would have been if it had been taken under the writ. The reason on which the law of distress is founded, is, that if the party has a right to do the act complained of, he shall not be deprived of the advantage which the right gives him by an immaterial misdescription of his right in the pleadings.

The only other case cited is, *Dr. Groenvelt v. Dr. Burwell and Others*, in 12 *Mod.* 386., 3 *Salk.* 354., and 1 *Lord Raymond*, 454. In that case the plea justifies the imprisonment, which was all that the plaintiff complained of, under a warrant from the *College of Physicians for mala*

malu praxis. The replication does not state any facts to shew from the Defendant's conduct, that they were not acting under the warrant, but merely says, "that which they did was done of their own wrong." This justification, as it is said in the short report of the case in *Salkeld*, was merely denying the legality of the warrant; and if he was not taken under the warrant, but for some other cause, he should have pleaded that cause specially. This was a traverse of a matter of law, namely, the legality of the warrant, and not, as in the present case, an allegation that the writ was not used, and would not authorise the manner in which the property was disposed of by the Defendants below. *Holt C. J.* says, "If the plaintiff was arrested for any other cause, and not on this warrant, then the plaintiffs should have shewn the other cause." The Plaintiff below, in the present case, has shewn that the goods were taken for another cause; he has satisfactorily proved at the trial that they were taken for another cause, and not under the writ.

If, according to the strict rules of pleading, he ought to have shewn the particular cause for which they were taken, it is too late to take advantage of that formal defence.

The cases on which the counsel for the Defendants below relies, are distinguishable from that which we are now called on to decide. This was an attempt to abuse the process of the Court, by suing it out for the purpose of defeating the Plaintiff's claim to freight.

We affirm the judgment of the Court below.

Judgment for Plaintiff below.

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REGULA GENERALIS.

WHEREAS it has been suggested to us, that inconvenience may in some cases arise, if the rule of this Court, made in *Hilary* term last, respecting the taking the acknowledgments of persons levying fines or suffering recoveries before commissioners, be continued in its present extent.

AND WHEREAS it appears to us upon consideration of the matters so suggested, that it will be more convenient to revoke the said rule, and make another in lieu thereof, IT IS THEREFORE ORDERED by the Court, that from and after the first day of the next term, the said rule shall be and the same is hereby revoked.

AND IT IS HEREBY FURTHER ORDERED, that from and after the said first day of the next term, when the acknowledgments of any person or persons levying fines or suffering recoveries shall be taken before commissioners, one at least of the commissioners for the taking the acknowledgment of any party to such fine or recovery, shall be a person who is not concerned as the attorney, solicitor, or agent or clerk to the attorney, solicitor, or agent of any party thereto, and that in the affidavit to be made of the due taking of such acknowledgment, it shall be deposed, in addition to the facts now required by the rules of the Court to be included in such affidavit, that one (at least) of the commissioners taking such acknowledgment is not the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent of any of the parties to the fine or recovery for the taking the acknowledgment to which the commission, under which he has acted, has been issued, and
the

the name and residence of such commissioner shall be stated in such affidavit.

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IT IS FURTHER ORDERED, that from and after the first day of next term, the commissioners do enquire of married women whether they intend to give up their interests in the estates to be passed by any fine or recovery, without having any provision made for them in return for or in consequence of their so giving up such interests; and if it appears to such commissioners that any provision is to be made on any such married woman, they shall not take her acknowledgment until they are satisfied that such provision has been made; and one of the commissioners taking the acknowledgment of such married woman, shall state in the affidavit to be made of the due taking such acknowledgment, that such enquiry was made, and also the answer given thereto, and where any such provision has been agreed to be made, that he the said commissioner is satisfied that the same has been made; and where such married woman, in answer to such enquiry, shall declare that she intends to give up her interest without any provision, that he the said commissioner has no reason to doubt the truth of such declaration, and verily believes the same to be true.

AND IT IS HEREBY FURTHER ORDERED, that from and after the first day of the next term, the affidavit of the due taking of any acknowledgment to any fine or recovery shall be in the form hereunto annexed, with such variations only as the circumstances of the case shall render necessary, and that the party or parties making the same do pursue the exact words of such form, and do not, unless absolutely necessary, substitute others which he or they may think synonymous thereto.

And, lastly, to avoid the delay and expense occasioned by any variance in the names of any of the parties making such acknowledgments between their signature thereto

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thereto and the *precipe* prefixed to such acknowledgment, or the *dedimus potestatem*, under which the same is taken, IT IS ORDERED, that the commissioners, before they sign their names to the caption of such acknowledgment, do take care that the signatures of the parties correspond with the *precipe* and *dedimus*, and that if any of the names are not correctly stated in the *dedimus*, they forbear to take the acknowledgment until the writ shall have been amended by the proper officer.

W. D. BEST.

J. A. PARK.

J. BURROUGH.

S. GASELEE.

FORM OF AFFIDAVIT

To be made by one of the Commissioners taking the acknowledgment of a Fine or Recovery.

A. B. of _____ in the county of _____ gentleman, one of the attornies of His Majesty's Court of _____ at *Westminster*, and one of the commissioners named in the writ of *dedimus potestatem* for taking the acknowledgment of the fine hereunto annexed [*or*, receiving the attorney or attornies of C. D. and E. his wife], maketh oath and saith, that he knows C. D. and E. his wife [if part only of the conuzors, "two of"] the conuzors named in the said fine [*or*, if a recovery, the said C. D. and E. his wife], and that the same [*or*, if a recovery, the warrant of attorney, a copy whereof is hereunto annexed] was duly signed and acknowledged by them the said C. D. and E. his wife, before this deponent and J. K. gentleman, one other of the attornies _____

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nies of His Majesty's Court of at *Westminster*,
 and another of the commissioners named in the said
 writ, on the day and year [*or*, days and year] mentioned
 in the caption [*or*, in the first (second or third) caption]
 thereof. And that the said *C. D.* and *E.* his wife, and
 also this deponent and the said *J. K.* were and each of
 them was at the time of the taking and acknowledging
 of the said fine [*or*, warrant of attorney] of full age and
 competent understanding, and that the said *E.* was [*or*,
 were] solely and separately examined apart from her
 said [*or*, their respective] husband [*or*, husbands] and
 freely and voluntarily consented to and acknowledged the
 said fine [*or*, warrant of attorney]. And that the said
C. D. and *E.* his wife severally and respectively knew
 the same to be a fine [*or*, that the said warrant of at-
 torney was intended for the suffering a common re-
 covery] to pass his, her, and their estate and estates.
 And this deponent further saith, that he this deponent
 [*or*, the said *J. K.*, as the case may be, adding if not the
 commissioner making the affidavit, "whose place of
 residence is at"] is not concerned
 as the attorney, solicitor, or agent, or clerk to the at-
 torney, solicitor, or agent of any or either of the parties
 to the said fine [*or*, recovery]. And this deponent
 further saith, that in pursuance of the order made by
 this Honourable Court in *Easter* term in the eighth year
 of the reign of His Majesty King *George* the Fourth, re-
 specting the acknowledgment of fines and recoveries,
 the said commissioners did enquire of the said *E.* [*or*,
 if more than one, of each of them the said *E.*, &c.],
 whether she intended to give up her interest in the
 estates to be passed by such fine [*or*, recovery] without
 having any provision made for her in return for or in
 consequence of her so giving up her interest in such
 estates; and that in answer to such enquiry, the said
E. declared that she did intend to give up her interest
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in the said estates without having any provision made for her in return for or in consequence of her giving up her interest, which declaration of the said this deponent has no reason to doubt the truth of, and verily believes the same to be true [or, declared that a provision was to be made for her in return for or in consequence of her so giving up her interest in the said estates, and this deponent, before her acknowledgment was so taken, was satisfied and does now verily believe that such provision has been made.]

If there are any rasures or interlineations in the acknowledgment or warrant of attorney, the affidavit to state that they were made before the parties signed the same. And if in the caption, that they were made before the caption was signed by the commissioners.

Where the whole of the facts cannot be spoken to by one deponent, the necessary alterations must be made to enable more than one deponent to state their respective parts of it.

END OF EASTER TERM.

AN
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TO THE
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ANNUITY.

See OUTLAWRY.

1. S., having occasion to raise 2800*l.* by way of annuity, desired the annuities to be divided into three; the consideration for all three was paid at one time and place to one person, who was

agent to all the grantees, and he retained 300*l.* for the expenses of all three annuities: Held, that all three might be set aside on equitable terms on account of this retainer, although the 300*l.* was retained in a bank note, which formed part of the consideration money of only one of the grantees. *Jones v. Silberschildt. Chappel v. Ditto. Worsley v. Ditto.* Page 26

2. An annuity of 10*l.* was granted by a son to his parents, in consideration of their giving up to him a farm they had occupied, and the stock on it worth 900*l.* Held, that the annuity need not be enrolled under 53 G. 3. c. 141. *Tetley v. Tetley and Another.* 214
3. Before suing the surety of the grantor of an annuity in respect of

of arrears of the annuity, where the grantor has become bankrupt, the value of the annuity must be ascertained by the commissioners, although the annuity was granted, and the grantor became bankrupt previously to September 1825. *Bell v. Bilton.*

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APOTHECARY.

A person having a certificate from the College of Surgeons cannot charge for attending a patient in a fever, unless he have also a certificate from the Apothecaries' Company. *Allison v. Haydon.*

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ARBITRATION.

See REPLEVIN BOND.

1. The authority of an arbitrator under a rule of court, which empowers him to deliver his award to the parties or their executors, does not determine by the death of one of the parties before the award is executed. *Clarke v. Crofts.*

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2. A submission to arbitration contained a stipulation that it should not be vacated by the death of either of the parties, but that, notwithstanding such an event, matters should be proceeded in.

The final award having been made after the death of one of the parties: Held, that a surety for the fulfilment of it was liable. *McDougall v. Robertson and Another.*

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ASSUMPSIT.

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ASSUMPSIT.

See BILL OF EXCHANGE, 3. VENDOR AND PURCHASER. CONDITION PRECEDENT, 2.

1. *A.* having sold *B.* shares in a projected joint stock company, and the undertaking having been abandoned before any thing was done pursuant to the project: Held, that *B.* might recover from *A.* the money paid for the shares. *Kempson v. Saunders.* Page 5
2. The charterer of a ship having consigned his cargo to *P.*, who authorised Defendant to sell it, the Defendant, by an agreement which stated those facts, undertook to pay Plaintiff, the owner of the ship, freight and demurrage, if any were due, and in every respect to put himself in the place of the charterer.

Fifty running days were allowed by the charter-party for loading and unloading, and ten for demurrage, at 10*l.* a day. The ship having occupied ninety-five days in loading and unloading, several of which elapsed after the date of the Defendant's agreement: Held, that he was liable in damages in respect of demurrage for the whole, and that a sufficient consideration appeared on the face of the agreement. *Benson v. Hippus.*

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ATTACH-

ATTACHMENT.

See PRACTICE, 10.

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See PARTNERS, 2.

AVOWRY AND COGNIZANCE.

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BAIL.

See PRACTICE, 10. ERROR, 2.

1. Where a bankrupt was about to be taken in execution, the Court would not, upon an affidavit which omitted to state where the commission was sued out, or where the commissioners resided, enlarge till a month after his final examination, the time for the bail's surrendering him. *Shaw v. Cash.* Page 80
2. Where the affidavit to hold to bail was regular, and the Defendant did not swear that he was unacquainted with the Plaintiff, the Court refused to cancel the bail-bond, on the ground that the Defendant could not find the Plaintiff. *Brown v. Moore.* 148
5. Bail at the request of the Defendant's attorney admissible, if not indemnified by him. *Hunt v. Blaquiere.* 588

BAIL-BOND.

See PRACTICE, 11.

BANKRUPT.

See ANNUITY, 3. BAIL, 1. EVIDENCE, 1. 11. JOINDER, 1.

1. Proving one debt under a commission of bankrupt does not preclude the creditor from electing to sue for another. *Bridget and Another v. Mills.* Page 18
2. September 24th 1824, D., the obligor, who, on 14th of August preceding, had quitted premises he held of the obligee, paid the obligee the balance on a bond due October 19th following; the fixtures left on the premises, which were valued on the 24th September, being taken in discharge of the other portion of the sum payable under the bond.

In July preceding, D., upon looking into his affairs, found he could only pay 17s. in the pound; and he sold his watch and part of his stock to satisfy some claims upon him. D. became bankrupt, October 28th 1824, but said he had no intention of becoming bankrupt at the time he paid the obligee, though he made the payment because he expected other creditors would get possession of his property.

In an action by D.'s assignee against the obligee: Held, that the jury were properly directed to consider, whether the payment were made with a view to the probability of D. becoming bankrupt, and in fraudulent preference of the obligee. *Flook, Assignee of Dring, a Bankrupt, v. Jones.* 20

3. Verdict

3. Verdict for Defendant in *July*. Commission of bankrupt against Plaintiff in *August*; judgment against him, and certificate under the commission, for him, in *discharge* term ensuing: Held, that he was liable to an execution for costs, notwithstanding 6 G. 4. c. 36. s. 56. *Bird v. Morris*. Page 57

4. *L.*, who held the lease of a public-house, was indebted to Defendants 1275*l.*, and had deposited his lease in their hands as security.

T., who had 650*l.* in Defendants' hands, purchased *L.*'s lease for 1690*l.*, the Defendants agreeing to advance him enough to make up the purchase-money, on retaining the lease as a security.

L., *T.*, and the Defendants' clerk met to complete the transfer, when *T.* drew a draft on the Defendants in favour of *L.* for 1690*l.* The Defendants' clerk received this draft, and on *L.*'s executing the transfer of the lease, gave him a draft on the Defendants for 415*l.*

On the evening of that day, *L.* having previously committed acts of bankruptcy, a creditor of his gave the Defendants' clerk notice not to pay the draft, as a docket would be struck against *L.*

Another of the Defendants' clerks, in consequence, refused payment when the draft was presented the next day, having also received a similar notice from the Plaintiff, another creditor of

L.'s. The Defendants, some days afterwards, paid the draft to a banker who presented it, but not till he had executed an indemnity.

Held, that the Plaintiff, as assignee of *L.* under a commission of bankruptcy subsequently issued, might sue the Defendants in an action for money had and received for the amount of this draft.

Held, also, that the Defendants had, before payment of the draft, sufficient notice of the bankruptcy. *Spratt and Another, Assignees of Lynch, Bankrupt, v. Hobhouse, Bart. and Others*. Page 173

5. The Defendant covenanted for the due payment by *A. B.* of a premium upon a policy of insurance effected to secure a debt due from *A. B.* to Plaintiff.

The premium became due *June* 17th, and being unpaid by *A. B.* or the Defendant, was paid by the Plaintiff. *June* 20th the Defendant obtained his certificate under a commission of bankrupt:

Held, his certificate did not discharge him from the amount of the premium. *Atwood and Others v. Partridge*. 209

6. The general bankrupt act, 6 G. 4. c. 16., which repealed all former bankrupt acts, came into operation *September* 1st, 1825.

A commission having been sued out *September* 8th, 1825, against *F.* upon an act of bankruptcy committed by him the *July* preceding:

Held, that it could not be supported.

ported. *Magg's, Assignee of Follet, Bankrupt, v. Hunt.*

Page 212

7. A bankrupt obtained his certificate on the 13th of November; the same day a *fieri facias* was executed on his goods: the Court refused relief on motion. *Hanson v. Blakey.* 493

BANKER'S LIABILITY.

See MONEY HAD AND RECEIVED, 1.

BILL OF EXCHANGE.

See PAYMENT, 2, 3.

1. Declaration on a bill of exchange made payable by the acceptor at the house of S., P., and S.: averment of presentment at the house of S., P., and S., held sufficient, and that it was not necessary to aver presentment to the acceptor or to S., P., and S. *Hawkey v. Borwick.* 135
2. A bill payable to the order of the drawer having been dishonoured by the acceptor, and paid by the drawer when due: Held, that the drawer might indorse it over a year and a half afterwards, and that his indorsee might recover against the acceptor. *Hubbard v. Jackson.* 390
3. Defendant and M., partners, having obtained leave to overdraw their bankers, the Plaintiffs, M. gave them a promissory note for 2000*l.*, as a security for advances, and Defendant thereupon gave M. a note for 1000*l.*, payable to order. Plaintiffs advanced

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1900*l.* to M. and Defendant, and two years after, being in possession of Defendant's note for 1000*l.*, by transfer from M., ~~made~~ Defendant. It did not appear that they had given M. any consideration for it, or that they had notice of the circumstances under which Defendant gave it to M.:

Held, they were entitled to recover. *Heywood and Others v. Watson.* Page 496

4. A bill was dishonoured on Saturday in a place where the post went out at half after nine in the morning: Held, that it was sufficient notice of dishonour to send a letter by the following Tuesday morning's post.

The holder's clerk, who copied the letter containing the notice, said, that the letter was put into the post on the Tuesday morning, but he had no recollection whether it was done by himself or another clerk:

Held, not sufficient evidence of putting into the post. *Hawkes and Others, Assignees of Day and Others, Bankrupts, v. Salter.* 715

5. If the executor of the acceptor of a bill of exchange, orally promise to pay the holder out of her own estate, provided he forbear to sue, and the holder forbear to sue in consequence, the promise being void, the drawer of the bill is not discharged by the holder's having promised to give time, and having delayed to sue under such circumstances. *Philpot v. Briant.* 717

3 E

BOND.

BOND.

Where Defendant entered into a composition to pay his creditors 6s. 8d. in the pound, upon condition of being released, and nearly two years afterwards gave one of them, who had agreed to sign the composition-deed, a bond for the residue of her debt, without the knowledge of the other creditors, she not having received the amount of her composition, but divers of the other creditors having signed the deed and received their composition: Held, that an action might be sustained on this bond. *Took v. Tuck.*

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BRITISH MUSEUM.

A part of a work, to which there were twenty-six subscribers, and of which only thirty copies were printed, — published at intervals of several years, at an expence exceeding the sum to be obtained by the price of the copies, and which expence was defrayed by a testamentary donation, was holden not to be a book demandable by the British Museum under 54 G. 3. c. 156. *Trustees of the British Museum v. Payne and Another.*

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BROKER.

A ship-broker is not within the various acts for the admission and regulation of brokers. *Gibbons v. Rule.*

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BUILDING ACT.

Defendant, who had a lease of land from N., entered into an agreement with G., who was to build houses, and pay Defendant a rent of 20l. a year. G. then employed Defendant to build the houses:

Held, that Defendant was liable to contribute to a party-wall to which the houses were attached:

Held, also, that the owner of the party-wall was not confined to ten days to give his notice, but, there being no adjoining house when it was built, might give the notice in reasonable time after the adjoining houses were attached. *Collins v. Wilson.*

Page 552

CARRIER.

1. A common travelling trunk of a large size, containing apparel and jewels, having been lost by the Defendant, a carrier, either through his having omitted to place it on his coach, or having fastened it there insecurely: Held, he was liable to make compensation to the owner, a gentleman travelling by his coach, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the carrier's office limiting his responsibility to five pounds in the absence of such dis-

disclosure, which notice the owner of the trunk, having been in the office, had an opportunity of seeing :

Held, that under the above circumstances the jury were properly directed to consider generally, whether the carrier had been guilty of gross negligence, without reference to the nature of the article conveyed. *Brook v. Pickwick.* Page 218

2. Plaintiff having been imposed upon by a swindler, consigned a box at *Birmingham* by the Defendants, as common carriers, to *J. West, 27. Great Winchester Street, London.* The Defendants found that no such person resided there; but upon receiving a letter signed *J. West*, requesting that the box might be forwarded to a public house at *St. Alban's*, they delivered it there to a person calling himself *West*, who shewed that he had a knowledge of the contents of the box: that person having disappeared, and the box having been originally obtained of the Plaintiff by fraud: Held, that the Defendants were liable to him in an action of trover. *Gaslee J. dissentiente.*

Held, also, that it was properly left to the jury to say, whether the Defendants had delivered the box according to the due course of their business as carriers. *Stephenson v. Hart and Waterhouse.*

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CERTIFICATE.

See *BANKRUPT*, 5.

COMPOSITION WITH CREDITORS.

See *BOND*, 2.

CONDITION PRECEDENT.

See *MONEY HAD AND RECEIVED*, 2.
COVENANT, 2.

1. The terms of a contract being as follows, "1st April 1826, sold *W. P.* one bale of sponge, at 10s. a pound, and bought of them yellow ochre at 5l. a ton, to be delivered on or before the 24th instant:"

Held, that the delivery of the ochre by the 24th, to the extent of the price of the sponge, was a condition precedent to the delivery of the sponge. *Parker and Another v. Rawlings.*

Page 280

2. Plaintiff engaged to effect for Defendant an insurance with such names as should be to Defendant's satisfaction. The voyage having been performed, and the Defendant never having required to see the names on the policy: Held, that in an action for the premium, he could not object that the names of the underwriters had never been exhibited to him for his approval. *Dixon and Another v. Howitt and Another.* 665

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See *BRITISH MUSEUM.*

In order to sustain an action for pirating prints, the proprietor's name and the date of publication

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tion must appear on the original print, pursuant to 8 G. 2. c. 13., but it is not necessary that the designation *proprietor* should be added to the name. *Newton v. Cowie and Another.* Page 234

CORPORATION.

1. A corporation aggregate may sue in assumpsit for use and occupation where the tenant has held premises under them, and paid rent. *The Mayor and Burgeses of Stafford v. Till.* 75
2. An act of parliament empowered the directors of a water company to make "contracts, agreements, and bargains with the workmen, agents, undertakers, and other persons engaged in the undertaking:"
Held, that an agreement for the fabrication and supply of pipes at certain stated periods, was not valid unless under seal. *East London Waterworks v. Bailey and Others.* 283

COSTS.

1. The costs of a suit in equity may be set off against the costs of an action in this court. *Webber v. Nicholas.* 16
2. In an action against the sheriff for a false return of *non est inventus*, per quod the Plaintiff was outlawed, the Plaintiff cannot recover the extra costs of the outlawry. *Jenkins v. Biddulph.* 160
3. Where, before action, a debt has been reduced under 40s. by part

payment, the Plaintiff is deprived of costs by the *Middlesex Court of Conscience Act.* *Nightingale v. Barnard.* Page 169

4. Plaintiffs, an Irish company, whose concerns were all carried on in Ireland, were compelled to give security for costs, notwithstanding an affidavit that they had money in a banker's hands in London, and that many of the members resided in England. *Limerick and Waterford Railway Company v. Fraser.* 394
5. Plaintiff having succeeded in setting aside a nonsuit, Defendant gave a *cognovit* for 1s. damages, and such costs as the *prothonotary* should think fit. *Prothonotary* having refused to allow Plaintiff the costs of the trial, the Court declined interfering. *Elvin v. Drummond.* 415
6. A Defendant, who has been holden to bail in an excessive sum, can only recover his costs under 43 G. 3. c. 46. s. 8. in the court in which the action is brought: where, therefore, the action was brought in the Palace Court, and removed into the Common Pleas, the Common Pleas refused to order his costs to be taxed. *Costello v. Corlett.* 474
7. Costs of taxing an attorney's bill not allowed to a party who succeeds in striking off a sixth, where the order for taxing is not obtained till after the action on the bill has been commenced. *Benton v. Bullard.* 561

COVENANT.

1. By a deed which recited that Defendants, the directors of a mine company, had purchased a mine for 4500*l.*, to be paid within a twelvemonth out of the monies to be raised by the company, with a proviso that the directors should be allowed six months further time, in case the bankers of the company should not within the twelvemonth have received sufficient deposits from the subscribers to enable the directors to pay thereout; the directors covenanted that out of the payments so to be made by the subscribers, they would pay the purchase-money at the time specified, subject to the aforesaid proviso:

Held, that the directors were personally responsible at the expiration of the eighteen months.

Hancock and Another v. Hodgson and Others. Page 269

2. *T. C.*, in consideration of covenants by *H. R. C.*, covenanted not to interfere in a certain branch of the Scotch fish business, and to assign to *H. R. C.* a certain Scotch fishery; *H. R. C.* in consideration of the assignment, and of *T. C.*'s covenant, covenanted to pay *T. C.* an annuity:

Held, that the covenant not to interfere in the business was only a part of the consideration for the annuity, and was, therefore, not a condition precedent or dependent covenant. *Carpenter,*

Assignee of Cresswell, a Bankrupt, v. Cresswell. Page 409

DEED.

Lease of lands by *A.* to *B.*, who was to grant under-leases at the direction of *C.*, *D.*, and *E.* (the object of which under-leases was to secure a ground-rent to *A.*), and subject to such under-leases was to stand possessed of the lease in trust for *D.* and *E.*, who were parties to the original lease:

After *C.*, *D.*, and *E.* had executed that lease, and before *A.* or *B.* had executed it, the lease was altered, with the consent of *C.*, by an erasure which excluded a certain portion of land inserted by mistake, but in which *D.* and *E.* had no interest. *A.* and *B.* then executed the lease:

Held, that this alteration did not render it invalid. *Hall v. Chandless.* 123

DELIVERY OF CHATTELS;
WHAT.

See *ESTOVER*, 1.

DEVISE.

1. An advowson in gross passes in a will under the word *tenement*.

Where a devisor, after leaving several estates for life; 1*s.* to his heir; directing that certain property should be sold to pay his debts; and other property, in case that first pointed out should

3 E 3

be

be insufficient; then, leaving 20*l.* a year more to his wife, to be charged on all that remained unsold, devised all the residue of his goods and chattels, lands and tenements, charged as aforesaid, to his brother, if living; if not, to his brother's children, with a proviso that C., T., and E. should have 200*l.* more than the others:

Held, that a fee passed in the residue. *Gully v. Bishop of Exeter.* Page 293

2. Devise to C. S. in trust for the separate use of S. S. and to convey the premises to S. S., her heirs and assigns, free from the control of her present or any future husband, and to permit her to take the rents and profits:

Held, that S. S. had no power of devising the premises. *Doe dem. Stevens v. Scott.* 505

DISCLAIMER.

See EJECTMENT, 2.

DISTRESS.

See LANDLORD AND TENANT, 2.
REPLEVIN, 1.

1. A barge, attached by a rope to a wharf, may be distrained for rent arrear in respect of the wharf and premises attached to it. *Buzzard and Others, Assignees of Robinson and Another, Bankrupts, v. Capel.* 137
2. Where cattle distrained damage-feasant were in a private pound, and the distrainer admitted they were about to be forwarded to a public pound: Held, that a ten-

EJECTMENT.

der of amends made while they were in the private pound was not too late. *Brown v. Powell.*

Page 230

EJECTMENT.

1. Lessor, lessee, under-lessee: In a lease from lessee to under-lessee, it was provided, that if under-lessee were guilty of a breach of covenant, lessee and lessor might enter: Held, that on breach of covenant in the lease to under-lessee, ejectment might be maintained by lessee alone. *Doe d. Bedford and Wheeler v. White.* 276
2. Defendant, who held under a tenant for life, received, on her death, a letter from the lessor of the Plaintiff, claiming as heir, and demanding rent; Defendant answered, that he held the premises as tenant to S.; that he had never considered lessor of Plaintiff as his landlord; that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that, without disputing the lessor of the Plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof, in a legal manner:

Held, that this was a disclaimer of lessor of Plaintiff's title. *Doe d. Calvert v. Frowd.*

557

ELEGIT.

ELEGIT.

1. By an inquisition taken on an *elegit* against C. C., it was found, that at the time of the judgment he was seised of certain lands in the occupation of B. In point of fact, these lands were vested in certain trustees in trust for C. C., and for raising a sum of money for A. F., but the trustees permitted C. C. to receive the rents :

Held, that the tenant, by *elegit*, could not sue B. for the rent. *Harris v. Booker.* Page 96

2. Devise to and to the use of M. J. for life; then to and to the use of L. D. and T. E. and their heirs, in trust for R. E. C. for life, with a declaration that the estates were so limited, and the legal estates vested in the trustees to support contingent estates and limitations, subsequent to the estate to M. J.

The trustees, prior to an *elegit* sued out against R. E. C., and executed on the property, but subsequently to the judgment, conveyed the property to another trustee, in trust for R. E. C. and certain of his creditors :

Held, that R. E. C.'s interest could not be taken under this *elegit*, as the legal estate was in the trustees at the time of the judgment, and R. E. C. had not a sole equitable estate at the time of the execution. *Harris v. Pugh.* 335

ERROR.

1. If hired bail be put in on a writ

of error, the Plaintiff may, issue execution. *Brown v. Brown.* Page 98

2. Bail in error not dispensed, with where the error, though real, is only of form. *Wadsworth v. Gibson.* 572

ESTOVER.

Where the bailiff of a manor assigned to a tenant in April, pursuant to the terms of a lease, a tree for house-bote; the bailiff was discharged in July, and the tenant cut down the tree in October: Held, a sufficient delivery, and that the tenant was entitled to fell the tree in October. *Courtenay v. Fisher and Another.* 3

EVIDENCE.

1. Action for toll traverse; evidence that the Defendant on a market-day sold forty-one quarters of corn by two sacks pitched in the market: Held, not sufficient to authorise a verdict against him. *Vines v. Mayor of Reading and Others.* 8
2. By the 6 G. 4. c. 16. it is enacted, that when notice is not given to dispute a bankruptcy, it shall be proved by the production of the commission.

Where, upon a trial, no notice having been given to dispute the commission, the proceedings under a commission were put in, as well as the commission, and a perfect petitioning creditor's debt did not appear upon the proceedings: Held, nevertheless, 3 E 4 that

that the validity of the commission could not be disputed. *Macbeath v. Coates*. Page 34

3. Several creditors of a bankrupt agreed to contribute in the usual way to the expence of watching the proceedings under the commission; by the usual way was meant, that each creditor should contribute to the expence in proportion to the amount of his claim. An attorney, employed by all, having sued one of them for the amount of his contribution. Held, that another, who had paid his share, was a competent witness to prove the Defendant's agreement. *Taylor v. Cohen*. 53

4. Upon an affidavit, that no copy or counterpart of a lease on which the Plaintiff had sued was in the possession or power of the Plaintiff, and that the attorney who drew the lease and counterpart had absconded, the Court refused to order the Defendant, who was in possession of the lease, to permit a copy of it to be taken. *Lord Portmore v. Goring*. 152
5. Trespass for assaulting and imprisoning Plaintiff.

Plea, that he was wilfully breaking down Defendant's fences, wherefore Defendant apprehended him, and took him before a magistrate.

Replication, that Plaintiff broke the fences in the *bond fide* assertion of a right of way; without this, that he broke them wilfully or for any other purpose than in exercise of his right of way.

Rejoinder, that the Plaintiff

was wilfully committing damage and spoil to Defendant's property:

Upon this issue, Held, that evidence of the existence of a right of way over the *locus in quo* was properly received with a view to shew the character of the Plaintiff's act. *Looker v. Halcombe and Others*. Page 183

6. Reputation is good evidence of marriage, though the party adducing it as evidence seeks to recover as heir at law, and his parents are still living. *Doe d. Fleming v. Fleming*. 266

7. Defendant agreed to pay Plaintiff, in consideration of her becoming his tenant, 20*l.* to repair the house, and also to make certain alterations.

Plaintiff became tenant under a lease, in which this agreement was not stated, and did the repairs; when Defendant promised to pay for them:

Held, that he was liable, at all events, on the account stated, and that evidence might be given of the agreement, although it had not been introduced into the lease. *Seago v. Deane*. 459

8. In an action on a charter-party against a charterer, the Court refused to compel the Plaintiff to allow the Defendant an inspection of the ship's log-book. *Rundle v. Beaumont*. 587

9. Plaintiffs, ship-owners, sued Defendant, their broker. The Court refused to compel him to give a copy of a letter which he had received, touching an adventure in which the ship was to

to have been employed. *Rowe and Others v. Howden*. Page 539

10. A kept mistress is not incompetent to give evidence for her protector, although she has passed by his name, and has appeared in the world as his wife. *Bathews v. Gallindo*.

610

11. Affidavit that a party is indebted to deponent in the sum of 100*l*. and upwards, and is become bankrupt, is, as against deponent, conclusive evidence of the bankruptcy. *Ledbetter, Assignee of Hollis, v. Salt*.

623

12. *B.*, called as a witness for the Defendant in an action brought by the Plaintiff, for a barge which *W.* had placed in the hands of Defendant, and which, it was alleged, *B.* had sold to the Plaintiff first; and then to *W.*, was holden a competent witness for the Defendant, having been released by *W.* *Radburn v. Morris and Another*.

649

EXCESSIVE BAIL.

See COSTS, 6.

EXECUTION.

See BANKRUPT, 7.

1. Where administration had been taken out, the Court refused, without the authority of the administratrix, to discharge Defendant out of execution after the death of the Plaintiff, although his administratrix and his assignees (he having been a bankrupt) disclaimed all interest in the action. *Fothergill v. Walton*.

711

2. Plaintiff, a ship-owner, agreed by charter-party with *T.* to take any goods on board which *T.* should ship, and convey them from *Van Diemen's Land* to *London*. *T.* covenanted to pay freight at the rate of 15*s.* per ton per month, ten days after the delivery of the cargo, and then consigned a cargo to Defendants by a bill of lading, under which they or their assigns were to pay freight as per charter.

T. being indebted to Defendants, they, on the arrival of the ship in *London*, sued out a writ of *fi. fa.*, and took the cargo forcibly from the ship, exhibiting the sheriff's warrant to the captain; they did not sell under the *fi. fa.*, but afterwards made affidavit at the custom-house that they landed the cargo as the importers.

Plaintiff having sued them in trespass for entering his ship and taking the cargo, and to a justification under the writ, having replied *de injuriâ absque residuo causæ*, and having new-assigned that the defendants took the goods for other causes than those mentioned in the plea: Held, that it was competent to the Judge to leave it to the jury to say, whether the goods were *bonâ fide* taken under the execution, or whether the execution was resorted to as a colour to enable the Defendants to get possession of and land the cargo as importers, without subjecting themselves to the claim or question that might have arisen if

if they had accepted them under the bill of lading. *Lucas and Others v. Nothells.* Page 729

FINE AND RECOVERY.

1. Where one of sixteen cognizors in a fine signed her name *E. P. B.*, whereas her name was *E. B.*, the Court would not, upon affidavit of identity, that the mistake was not discovered till after execution, and that one of the sixteen cognizors was dead, allow the fine to pass as to *E. B. Parker, Demandant; Parker, Tenant.* 79
2. Meadow will pass in a recovery under the word "land," and the Court will not amend by adding the word "meadow." *Cook, Demandant; Yates, Vouchee.* 90
3. In a recovery "callet to warranty" is an improper expression. *Linney, Vouchee.* 101
4. Fine. Misnomer of the consors; what, not amendable. *Greenough, Demandant; Scott and Wife, Deforciantes.* 104
5. An affidavit of the caption of a fine taken before a consul abroad, is insufficient. *Ex parte Lady Hutchinson, Comusee.* 606
6. Recovery amended by abridging the returns. *Still, Demandant; Raymond, Tenant; F. Law, first Vouchee, v. J. Law, Second Vouchee.* 425
7. The Court refused to amend a recovery by altering *Berks* into

Bucks. Drowning, Demandant; Selby, Vouchee. Page 426

FOREIGN JUDGMENT.

An action lies in the *English* courts on a *Scotch* judgment of *horneing* against a *Scotchman* born.

Where the testator resided and died abroad: Held, his executor in *England* might be sued within six years after taking out probate. *Douglass and Another, Assignees of Stein and Smith, Bankrupts, v. Forrest, Executor of James Hunter.* 686

FRAUDS, STATUTE OF.

See *HIRING FOR A YEAR. ASSUMPSIT, 2.*

1. *A.* being indebted to Plaintiff, promised Plaintiff, that in consideration of his forbearing to sue, *A.*'s executor should pay him 10,000*l.*:
Held, that this was not a promise required by the statute of frauds to be in writing. *Wells v. Horton, Executor of C. Blissett.* 40
 3. An auctioneer employed to sell goods on certain premises for which rent was in arrear, was applied to by the landlord for the rent, the landlord saying, it was better to apply so than to dis-train; the auctioneer answered, "You shall be paid; my clerk shall bring you the money."
Held, that an action lay on this promise without a note in writing. *Bampton v. Paulin.* 264
3. 1. If

HIRING FOR A YEAR.

3. 1. If *A.*, without authority, makes a contract in writing for the purchase of goods by *B.*, and *B.* subsequently ratifies the contract, such ratification renders *A.* an agent sufficiently authorised to make the contract under the statute of frauds.

2. Where the purchaser of goods refuses to take them, the vendor, by reselling them, does not preclude himself from recovering damages for the breach of contract. *Maclean v. Dunn and Another.* Page 722

FREIGHT.

See SHIPPING, 1.

GENERAL ISSUE.

See PLEADING, 8.

GUARANTEE. (*Implied.*)

See PLEADING, 3.

HIRING FOR A YEAR.

The Plaintiff, commencing his service in *March*, served the Defendant, an army-agent, for many years, in the capacity of his clerk. In 1811 Plaintiff's salary was paid quarterly; for the last six years before 1826, it was paid monthly. Defendant having dismissed the

INSOLVENT. 769

Plaintiff in *December 1826*, without assigning any reason:

Held, that there was an implied yearly hiring; that Defendant must pay the salary till *March*, and that the contract need not be in writing. *Beeton v. Collyer.* Page 309

HOUSE-BOTE.

See ESTOVER, 1.

ILLEGAL CONTRACT.

An action will not lie on a contract entered into on a *Sunday*, although entered into by an agent, and although the objection is taken by the party at whose request the contract was entered into. *T. Smith v. F. and R. Sparrow.* 84

INNUEENDO.

See PLEADING, 9.

INSOLVENT.

1. A cognovit given by an insolvent after his discharge upon proceedings commenced before, constitutes a new promise, upon which he becomes liable, notwithstanding his discharge. *Sweeney v. Sharp.* 37
2. A lessor, whose property has been assigned to a provisional assignee under the insolvent debtor's act, cannot eject an occupier of land which passed under the assignment, although the provisional

provisional assignee has never taken possession, nor any permanent assignee been appointed, nor the rent ever been withheld from the lessor. *Best C. J. dissentiente. Doe dem. Palmer v. Andrews.* Page 948

3. Where an insolvent dies after petition and assignment to his provisional assignee, but before examination and assignment to his assignees in chief:

Held, that the assignees in chief take, nevertheless, all the property assigned to the provisional assignee. *Willis and Another, Assignees of Elliott, v. Elliott.* 392

4. The Court refused to liberate, on motion, a discharged insolvent, who had been arrested by his surety for the arrears of an annuity accruing subsequently to the insolvent's discharge, and paid by the surety. *Freeman v. Burgess.* 416

5. Where a party is detained in custody for a judgment-debt, the attorney who was concerned in the cause for one of the detaining creditors, cannot, without a power for the purpose, sign for him the note for sixpences. *Macbeath v. Ellis and Others.* 578

INSURANCE.

See SET-OFF, 2.

1. A female, upon whose life it was proposed to effect an insurance, was represented to the insurers in December 1822 by A., a medical man, as enjoying ordinarily a good state of health:

The same representation was

repeated by A. in March, and the insurance was effected in April 1823:

Between December 1822 and March 1823 she had been ill with a pulmonary attack, and was attended by B., but no disclosure of these circumstances was made to the insurers:

In April 1824 she died of pulmonary disease:

Held, on motion for a new trial, that the jury ought to have been called on to consider whether the illness in 1823, and the attendance of B., ought to have been disclosed to the insurers, and that it was not sufficient to direct them generally, to consider whether or not there had been any misrepresentation. *Morrison v. Muspratt and Others.* Page 60

2. Provisions do not contribute to general average, even where the cargo of the ship consists only of passengers. *Brown v. Stapleton and Others.* 119

3. An insurer on goods is not liable, when the goods are sold by the captain of a ship to defray the expence of repairs, rendered necessary by a tempest, to which ship and goods had been exposed. *Sarguy v. Hobson.* 131

4. Abandonment is not necessary upon a loss in an insurance on freight. *Mount v. Harrison.* 388

5. A policy of insurance stipulated, "that the goods insured were and should be valued at five tierces coffee, valued at 24s. per tierce, say 120s.; that policy to be deemed sufficient proof of interest:"

Held,

Held, that the policy was void under 19 G. 2. c. 37. *Murphy and Another v. Bell.* Page 567

6. Where damage was done to a cargo by water escaping through the pipe of a steam-boiler, in consequence of the pipe having been cracked by frost:

Held, that this was not an act of God, but negligence in the captain, in filling his boiler before the time for heating it, although it was the practice to fill overnight when the vessel started in the morning. *Siordet v. Hall and Others.* 607

JOINDER.

Assignees under a joint commission against two partners, may recover in the same action debts due to the partners jointly, and debts due to them separately. *Graham and Another, Assignees of Wilkinson and Another, Bankrupts, v. Mulcaster.* 115

JOINT STOCK COMPANY.

See PARTNERS, 1. COVENANT, 1.

JOINT TENANT.

See REPLEVIN, 1.

JUDGMENT.

See PRACTICE, 6. SET-OFF, 1.

LANDLORD AND TENANT.

See DISTRESS, 1.

FRAUDS, STATUTE OF, 2.

EJECTMENT, 1. EVIDENCE, 7.

1. Cognizance for rent arrear under a demise from *W.* It appeared by the lease, that *W.* was a receiver in Chancery, "in a cause wherein *A.* was Plaintiff and *B.* Defendant;" the reddendum was to *W.* or any future receiver:

Held, that the lessee could not plead non tenuit. *Dancer v. Hastings.* Page 2

2. A landlord's receiver allowed the tenant to make a deduction in respect of a payment for land-tax every year for seventeen years, greater than the landlord was liable to pay, the landlord knowing, or having the means of knowing, all the facts: Held, that he could not distrain for the amount erroneously allowed, though the receipt given every year shewed the amount paid and the amount deducted. *Bramston v. Robins.* 11
3. *T.* holding pictures of *P.* as a security for an alleged debt, hired rooms of the Plaintiff in which to deposit them. *P.* having died, the Defendants, his administrators, contested *T.*'s claim by a suit in Chancery. Pending the suit, in order to prevent the pictures from being distrained, they petitioned the Court to satisfy the Plaintiff's rent out of certain funds paid into court in the course of the cause. *T.*'s claim having been dis-

disallowed by the Court, the pictures were ordered to be delivered to the Defendants, who, in order to obtain them, paid rent to the time of delivery :

Held, that these circumstances did not constitute the Defendants tenants to the Plaintiff. *Strahan v. Smith and Another.*

Page 91

4. Where a tenant entered under an agreement for a lease for seven years, which was never executed: Held, that he was not entitled to notice to quit at the end of the seven years. *Doe dem. Tilt v. Stratton.* 446

LAND-TAX.

See LANDLORD AND TENANT, 2.

LIBEL.

See PLEADING, 5. 9.

1. Advertisement in a newspaper as follows: " To bill-brokers and others. Caution. Reward. Whereas information has been given to me that attempts have been made to obtain the discount of a bill of exchange, bearing date *London, May 26th, 1825*, and purporting to be drawn by one *John Stockley* upon and to be accepted by the dowager lady *P. Turner* for 6000*l.*, with interest, payable twelve months after date, to the order of the said *J. Stockley*,—I do hereby give notice, on behalf of the dowager lady *P. T.*, that she has not accepted such bill, and that if her name should appear on any such instrument,

the same has been forged; or her hand-writing to the said acceptance of the said bill, if genuine, has been obtained by fraud, in total ignorance on her part of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the said instrument shall be handsomely rewarded. *Thomas Binns:*"

Held, not a libel on *Stockley*, at least without innuendo and proof that he was the person designed to be charged with having forged lady *P. Turner's* name. *Stockley v. Clement.* Page 162

2. The Defendant published some doggrel lines describing the failure of the Plaintiff, *Levi*, a bound bailiff, to arrest a party of whom he was in search; the lines were headed by a wood-cut, and the Plaintiff was styled "*Levy the Bum.*"

The Plaintiff brought his action; the jury before whom the cause was tried, enquired whether a shilling would carry costs, and being answered in the affirmative, found a verdict for the Defendant.

The Court granted a new trial. *Levi v. Milne.* 195

3. A jury, directed to find whether a libel submitted to their consideration were a privileged communication, and if so, whether it were attended with express malice, found for the Plaintiff 50*l.* damages, and that the Defendant was not actuated by express malice:

Held,

Held, that the Plaintiff was entitled to retain his damages.
Blackburn v. Blackburn.

Page 395

4. The Plaintiff having advertised for sale a bond, executed to him by the Defendant, the payment of which had been resisted in a long course of litigation in which the validity of the bond had been disputed, the Defendant published, among the persons assembled to bid for the bond at an auction, a statement of all the circumstances under which the bond was given, and alluding to the Plaintiff, concluded: — " His object is either to extract money from the pocket of an unwary purchaser, or, what is more likely, by this threat of publication, to extort money from me."

Held, that this exceeded the latitude allowed for privileged communications, or observations on titles by a party interested; and that it was a libel, although no express malice was proved.
Robertson v. M'Dougall. 670

LIMITATIONS, STATUTE OF.

See FOREIGN JUDGMENT.

1. Defendant being applied to, to pay a debt barred by the statute of limitations, said he should be happy to pay it if he could:

Held, that the Plaintiff must shew the Defendant's ability to pay. *Ayton v. Bolt.* 105

2. Where a party revives a debt barred by the statute of limitations, by paying it into Court, but at the same time refuses to

pay interest, such payment of the principal does not revive the claim for interest. *Colliger v. Willcock and Others.* Page 313

MAGISTRATES (*Action against*).

The Plaintiff, having sued a magistrate, gave notice of his cause of action, that the magistrate had unlawfully convicted him of not paying wages, and had issued a warrant for seizing his goods directed to *J. Bark*, under which they were seized accordingly.

The warrant having been directed to the constable of *Hali-fax*, and not to *J. Bark*:

Held, that the notice was insufficient. *Aked v. Stocks and Others.* 509

MEMORANDA.

Pages 1. 384. 387. 445.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 1. BANKRUPT, 4.

- L. A customer of a banker delivered to his wife certain printed checks signed by himself, but with blanks for the sums, requesting his wife to fill the blanks up according to the exigency of his business. She caused one to be filled up with the words, *fifty pounds two shillings*, the *fifty* being commenced with a small letter, and placed in the middle of a line: — the figures 50. 2s.

were

were also placed at a considerable distance from the printed £:— in this state she delivered the check to her husband's clerk to receive the amount; whereupon he inserted at the beginning of the line in which the word *fifty* was written, the words *three hundred and*, and the figure 3 between the £ and the 50.

The bankers having paid the 350*l.* 2*s.*: Held, that the loss must fall on the customer. *Younge v. Grote and Others.* Page 253

2. Defendant, a loan-contractor, delivered to *L.* certain scrip receipts, purporting that *L.* had paid him 10 *per cent.* deposit in respect of a certain amount of *Neapolitan* stock, and entitling the bearer to certificates for that amount of stock, upon his paying the balance *February* 1. 1823; but there was no stipulation that the deposits should be forfeited in case of non-payment of the balance. *L.* forthwith transferred the receipts to Plaintiff for valuable consideration. Defendant then, by public advertisement, offered the holders of these receipts, upon certain conditions, an extension of time for payment of the balance due on them, requiring also that the receipts should be left at his office, for the purpose of being marked as holden under the new conditions. The receipts transferred by *L.* to the Plaintiff were by him accordingly sent to the Defendant's office, where they were indorsed by the Defendant with the

Plaintiff's name. The Plaintiff and others having failed to comply with the new conditions, the Defendant refused to deliver the certificates or to return the deposits: Held, that the Plaintiff might, in an action for money had and received, recover of the Defendant the amount of the deposits paid by *L. Hennings v. Rothschild.* Page 315

MONEY PAID BY MISTAKE.

See LANDLORD AND TENANT; 2.

NEW TRIAL.

See LIBEL, 2.

1. The Court refused to grant a new trial on an affidavit that a witness (called on the part of the Defendant, and who had refused to release an interest which rendered him incompetent) had misapprehended the effect of the release, and was now ready to execute one. *Kellen v. Bennett.* 171
2. The Court will not grant a new trial, on the ground that witnesses, by whose testimony the verdict was obtained, have been indicted for perjury in the cause. *Seely v. Mahab.* 561

NOTICE.

See MAGISTRATES (*Action against*).

NOTICE

NOTICE TO QUIT.

See LANDLORD AND TENANT, 4.

OUTLAWRY.

See COSTS, 2.

A party outlawed in *K. B.* in an action to recover the arrears of an annuity, cannot be heard in *C. P.* on a motion to set aside the annuity. *Loukes v. Holbeach.*

Page 419

PARTNERS.

1. The Plaintiff's name was entered in a book, with those of several other subscribers, to a projected joint stock company. The Plaintiff received certain scrip receipts, but sold them before the deed for the formation of the company was executed, and he was not a party to that deed:

Held, nevertheless, that he was a partner in the concern. *Sir John Perring and Others v. Hens.* 28

2. The Plaintiff, a holder of shares in a washing company, drew bills on the directors of the company for goods furnished by him and his brother. The bills were accepted "for the directors" by the secretary of the company, who had authority to accept bills drawn by the Plaintiff's brother:

Held, that the Plaintiff could

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not recover on these bills, against the company. *Neale v. Turton and Others.* Page 149

PAYMENT.

1. The Plaintiff, in *October*, authorized the Defendant to pay in at certain bankers money due from the Defendant. Owing to a mistake it was not then paid; but Defendant, who kept an account with the same bankers, transferred the sum to the Plaintiff's credit on *Friday* the 9th of *December*.

The Plaintiff being at a distance, did not receive notice of this transfer till the *Sunday* following, and, on *Saturday* the bankers failed:

Held, that this was a sufficient payment by the Defendant. *Eyles v. Ellis.* 112

2. Defendant had accepted a bill payable at three months for the amount of goods he had purchased:

The seller lost the bill, not having indorsed it, and became bankrupt:

No demand was ever made on the Defendant in respect of the bill:

Held, that the acceptance of this bill was no defence to an action for the value of the goods. *Rolt, Assignee of Welsford, Bankrupt, v. Watson.* 273

3. The Defendant had given the Plaintiff bills for goods, which bills had been transferred to a third person; but at the time of the trial of an action for the

3 F value

value of the goods, though not at the commencement of the action, they were again in the Plaintiff's hands overdue and unpaid by the Defendant: Held, he was liable, notwithstanding he had given the bills. *Burden v. Halton.* Page 454

PLEADING.

See BILL OF EXCHANGE, 1. EVIDENCE, 5. EXECUTION, 2. LANDLORD AND TENANT, 1. VENDOR AND PURCHASER, 2.

1. Venue cannot be changed after plea in abatement any more than after plea in bar. *Wigley v. Dubbins.* 18

2. The circumstance of an action's being brought on a writing is not a ground for rejecting an application to change the venue, unless the declaration disclose the existence of the writing. *Picard v. Featherstone.* 39

3. Where Plaintiff, an auctioneer, sold goods under order of the Defendant, who had no right to dispose of them, and the true owner afterwards recovered against the Plaintiff; a declaration in case, which alleged that the Defendant, being possessed of the goods represented to Plaintiff that he was entitled to dispose of them; that Plaintiff in consequence, at Defendant's request, sold them by auction, and, after deducting certain charges for his trouble, paid the residue of the proceeds to the Defendant; that the Defendant deceived the Plaintiff in this, that he was

not at the time of the sale entitled to dispose of the goods, and that the true owner afterwards recovered the value of the Plaintiff, and that the Defendant refused to reimburse him: Held, sufficient after verdict. *Allamson v. Jarvis.* Page 66

4. Trespass for assaulting and imprisoning Plaintiff. Plea, that he was trespassing on Defendant's close. Replication, that Defendants had nothing in the close except under R. N. C.; that before the time when, &c., and before Defendants had any thing in the close, R. N. C. deeded it from year to year to W. C.; that W. C. permitted Plaintiff to plant a crop of teasles on condition that W. C. should have one half of the crop, and Plaintiff the other, and that Plaintiff entered to cut his teasles, when Defendants assaulted him. 41 line

Held, that the replication was a sufficient answer to the plea, though it did not allege that W. C.'s interest in the land was continuing when Plaintiff entered to cut the teasles. *Kingebury v. Collins and Another.* Page 202

5. The Plaintiff declared, that the Defendant slandered him by saying of him to a person about to supply him with goods, "Ware hawk; you must take care of yourself there; mind what you are about;" Held, that the action lay, though the Plaintiff did not prove the latter part of the sentence, "You must take care of yourself there." *Orpwood v. Barnes.* 261

6. Plaintiffs

6. Plaintiffs declared on a writ of *the king*. The writ produced in evidence was in the name of *George the Third*, but tested in the name of *East Chief Justice*, and indorsed with the date of 1826.

Held, no variance. *Elvin and Another v. Drummond*. Page 278

7. Writ of entry sur abatement of *six messuages, six mills, &c.*

Plea, that *R. S.* devised the said messuages, mills, &c., and parcel of the land, to *T.*, who devised them to *S.*, wife of *R. D. C.*, who levied a fine to the tenant.

The plea concluded with a verification, and a prayer of the messuages, &c., and land, *in the count*:

The fine set out in the plea described the premises as *four messuages, one cloth mill, &c.*, and the statement of the fine ended with a *prout potet per recordum*.

Held; that the plea was not double.

That the prayer of judgment for the messuages and land in the count did not vitiate the plea, notwithstanding the commencement of the plea applied only to the messuages and parcel of the land:

That it was not necessary for the plea to conclude with a *prout potet*, that allegation being introduced before the conclusion: and

That the premises in the fine were sufficiently identified with those in the introductory part of the plea. *Rowles v. Lusty*. 428

8. Assumpsit: *HERI* was a plea that the Defendant's undertaking was for the default of another, without writing, and without consideration, might be pleaded, although the facts might have been given in evidence under the general issue.

So, a plea that the person for whom the Defendant's undertaking was given, was a *feme covert*. *Maggs, Assignees of T. and J. Howell, Bankrupts, v. Ames*. Page 470

9. Libel. The declaration alleged, that whereas divers persons had been associated together, under the name of "The Society of Guardians for the Protection of Trade against Swindlers and Sharpers," and the Defendant, under pretence of being secretary of the society, had from time to time published printed reports for the purpose of announcing to the society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed as members of the society; and whereas the Plaintiff was a merchant of good character, yet the Defendant falsely and maliciously published of and concerning the Plaintiff in his trade and business the following libel:—

"Society of Guardians for the Protection of Trade against Swindlers and Sharpers. I, E. F., am directed to inform you, that the persons using the firm of *Goldstein* (meaning the Plaintiff) are reported to the society as improper to be proposed to be

3 F 2 balloted

balloted for as members thereof;" thereby meaning that the Plaintiff was a swindler and a sharper, and an improper person to be a member of the said society :

Held, that the innuendo could not be supported without a previous averment, that it was the custom of the society to designate swindlers and sharpers by the terms, *improper persons to be members of that society*, and that it did not appear that the society described in the libel was the society described in the introductory part of the declaration. *Goldstein v. Foss and Another.*

Page 489

10. In an action against the sheriff for an escape, it is sufficient to allege, that the writ for the caption of the escaper was duly indorsed for bail for —*l.*, without adding, "by virtue of an affidavit made and filed of record." *Wilcoxon v. Nightingale.* 501

11. Where Defendant pleaded delivery of a pipe of wine in satisfaction of the Plaintiff's demand, the Court refused to permit Plaintiff to sign judgment as for want of a plea, upon affidavit that the plea was false. *Smith and Others v. Backwell.* 512

12. The assignee of the reversion suing Defendant in covenant, alleged that the lessor was seised (without stating of what estate), and being so seised, devised to Plaintiff in fee.

After verdict: Held, a sufficient allegation of title. *Harris and Another v. Beavan.* 646

13. Where, to an action on a bill of exchange, the Defendant pleaded a rambling demurrable plea, which appeared to be a trick on the face of it, the Court ordered it to be struck out on an affidavit of its falsehood, giving the Defendant leave to plead *de novo*, and requiring him to try at the next sittings. *Jones and Another v. Studd.* Page 663

14. Plaintiff alleged that Defendant, having agreed to convey her safely by his coach from London to Blackheath, neglected his duty, by throwing her down, &c.

Defendant's coach ran from Charing Cross to Blackheath, and Plaintiff got up in *The Elephant and Castle*; but Defendant had inscribed on his coach "London to Blackheath." Held, no variance. *Ditcham v. Chivis.*

Page 706

15. The declaration stated, that J. S. by deed conveyed the purparty of an advowson to A. S. By the deed J. S. had conveyed the whole, but it appeared that he possessed only a purparty :

Held, no variance. *Gaddy v. Bishop of Exeter.* 293

16. The Plaintiff in *quare impedit* having traced his title through a period of two centuries, and the Defendant having, in forty-three pleas, taken issue on every allegation in the declaration, though the Plaintiff's claim rested solely on the validity of a deed of 1672, and the Defendant could have no writ to the bishop, unless he succeeded in setting aside that deed, the Court, after the declaration had

had been amended twice, and after trial had, rescinded the rule to plead several matters. *Gully and Others v. Bishop of Exeter and Another.* Page 525

PRACTICE.

See BAIL. COSTS, 4. ERROR, 1. EVIDENCE, 4, 8, 9. EXECUTION, 1. INSOLVENT, 4, 5. PLEADING, 13. TROVER, 2.

1. Affidavit to hold to bail; that the Defendant was indebted to the Plaintiff for money received to the use of his wife.

The process was at the suit of husband and wife:

Held that the affidavit was insufficient. *Wade and Wife v. Wade.* 50

2. Where the Defendant was arrested on a *testatum capias* into *Devonshire*, without any affidavit filed on issuing the *testatum capias*, an affidavit having been filed on issuing a previous *capias* into *Cambridgeshire*: Held regular, though the *testatum* was not tested on the *quarto die* post of the original; the filacer for *Cambridgeshire* being the proper officer to issue writs into *Devonshire*.

Where the demand is made up of several items, it is sufficient to indorse the total of them on the writ. *Evans v. Bidgood.* 63

3. An affidavit entitled "In the Common Place," held sufficient. *Ridley v. Burke.* 101

4. Affidavit to hold to bail; what insufficient. *M Taggart v. Ellice.* 114

5. Affidavit of debt by bankrupt for assignees insufficient. *Tucker and Others, Assignees of Gilbert, Bankrupt, v. Francis.* Page 142

6. A Defendant being under terms to plead issuably, put in an issuable plea. The Plaintiff replied, and gave notice of trial; Defendant demurred to the replication, whereupon Plaintiff signed judgment: Held, that the judgment was irregular. *Betts, Executor, v. Applegarth.* 267

7. An affidavit of debt sworn before a commissioner in the country is insufficient, if it do not state the party before whom it is sworn to be a commissioner. *Howard v. Brown.* 393

8. Where a cause is made a *remanet* at the *assizes*, a new notice of trial is necessary. *Gains v. Bilson.* 414

9. Malpractice. *Morgan v. Short,* 147

10. An application to set aside an attachment for not bringing in the body, should be grounded on an affidavit that it is made at the expence of the bail. *Rex v. Sheriff of London, in Wilson v. Goldstein and Another.* 427

11. The Court refused to set aside a bail bond on the ground that the Defendant had been arrested in the *Tower Hamlets*, by virtue of a writ which had no *non omitas* clause. *Bell v. Jacobs.* 523

12. Affidavit, that Defendant was indebted to Plaintiff in 20*l.*, for money lent on a bill of exchange, drawn by S., accepted by Defendant, and overdue and unpaid: Held sufficient, without saying

"lent to Defendant." *Bennett v. Dawson.* Page 609

RECEIVER.

See LANDLORD AND TENANT, 1.

RECOVERY.

See FINE AND RECOVERY.

REGULA GENERALIS.

51. 102. 247. 549.

REPLEVIN.

See LANDLORD AND TENANT, 1.

STAMP, 1.

1. One joint-tenant may, without the assent of his fellows, appoint a bailiff to distrain for rent due to all the joint-tenants. *Robinson v. Hoffman.* 562
2. Allowing two years to elapse without proceedings: Held to be a breach of the condition in a replevin-bond to prosecute the replevin without delay, and that the obligee might recover on such breach, although judgment of *non-pros* was never signed in the county court. *Axford v. Perrett.* 586

REPLEVIN BOND.

The Plaintiff and Defendant, in a replevin suit, referred the cause to an arbitrator, and agreed, without the privity of the sureties, that the replevin bond should stand as a security for the per-

SHIPPING.

formance of the award: Held, that the sureties were discharged. *Archer v. Hale.* Page 464

SET-OFF.

1. A judgment debt due from *B.* and others, in an action of trespass, in which *B.* was chiefly concerned, and bound to indemnify his co-defendants, was set off against a judgment-debt due to *B.* from Plaintiff. *Bowne v. Bennett and Others.* 423
2. Defendant, an insurance-broker, being sued for premiums received by him on policies subscribed by the Plaintiff, was allowed to set off a loss on one of those policies effected in the name of the Defendant at the request of *T.*, on goods in which *T.* was interested, but on which the Defendant had a lien to a greater amount than the set-off claimed. *Davies and Another, Assignees of Hays, v. Wilkinson.* 573

SHERIFF.

See TROVER, 4.

SHIPPING.

By the mortgage of a ship, accruing freight passes to the mortgagee, notwithstanding 6 G. 4. c. 110. s. 45, which enacts that the mortgagee shall not be deemed owner, except for the purpose of making a transfer. *Dean and Another, Assignees of Prince, a Bankrupt,*

Bankrupt, v. M'Ghie and Another. Page 45

SPRING GUNS.

The Defendant, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house: the Plaintiff, who climbed over the wall in pursuit of a stray fowl, having been shot: Held, that the Defendant was liable in damages. *Bird, an Infant, by J. Bird, his next Friend, v. Holbrook.* 628

STAMP.

By 11 G. 2. c. 19. s. 23, the sheriff, on taking a replevin bond, must ascertain the value of the goods distrained, on oath. Where the under-sheriff administered the oath to A. B., the broker, and there was also written on the margin of the replevin bond, "A. B. maketh oath, that the value of the goods within specified is 49l. 16s. Od.:"

Held, that this was a mere memorandum, and did not require an affidavit stamp. *Dunn, Assignee, v. Lowe, One, &c.* 199

STATUTE. (Construction of.)

See CORPORATION, 2.

1. By s. 32. of a private act of parliament, a water company was empowered to "break up the soil and pavement of roads, highways, footways, commons, streets, lanes, alleys, passages, and public places," provided (s. 34.) that

they should not enter any private lands without the consent of the owner:

Held, that the company had no authority, without the consent of the Plaintiff, to enter a field of his, over which there was a public footpath. *Scales v. Pickering,* Page 448

2. Where the expences of passing an act of parliament are directed by the act to be defrayed out of certain tolls to be levied under the act, it is incumbent on the party who sues for the expence of soliciting the act, to shew that tolls have been collected sufficient to cover his demand. *Andrews v. Dally.* 566

STAYING PROCEEDINGS.

See TROVER, 2.

STOPPAGE IN TRANSITU.

1. The shippers, acting for G., purchased and paid for with their own money flour at *Steakton*, which was sent by a vessel to *London*, and the invoice forwarded to G. A manifest of the flour was also forwarded by the shippers to a wharfinger in *London*, whose practice it was to deliver goods to the consignee named in the manifest upon application, and till application to keep it on board the vessel; if not applied for before the vessel returned, he landed it, and kept it in his warehouse, to the order of the shipper; if the goods were to be delivered to order, he delivered them to persons producing

ing either bills of lading or the shipper's invoices. G. was in the habit of having flour consigned to him at the wharf, and sometimes sold it on board, sometimes when it was landed, and kept for him in the wharfinger's warehouses.

The flour in question arrived at the wharf on the 12th of April, but was not landed till the 22d; on the 17th, before any application by G., who had become bankrupt, the flour was claimed under an order from the shippers: Held, that the flour not having been landed, nor any application having been made by G., the shippers might stop in transitu. *Tucker and Others, Assignees of Gilbert, Bankrupt, v. Humphrey.* Page 516

2. *P.*, to whom goods were consigned, said, on their arrival at a wharfinger's, that he would not have them, and directed an attorney to do what was necessary to stop them. The attorney, on the 3d of November, gave the wharfinger an order not to deliver them to the consignee, which order the consignor wrote to confirm on the 6th; on the 7th the goods were claimed under an execution at the suit of *A.*:

Held, that the contract between *P.* and the consignor was rescinded; that the *transitus* was not ended by the arrival of the goods at the wharf and the order given by *P.*; and that the consignor had a right to stop in transitu. *Bartram v. Farebrother.*

579

SURETY.

See ANNUITY, 3. ARBITRATION, 2.

REPLEVIN BOND.

SUNDAY.

See ILLEGAL CONTRACT.

TITLE DEEDS.

See TROVER, 1.

TOLL TRAVERSE.

See EVIDENCE, 1.

TRESPASS.

See EVIDENCE, 5.

TROVER.

1. Plaintiff delivered to Defendant the title-deeds of Plaintiff's wife's estate. Plaintiff having afterwards levied a fine of the property to the use of his son: Held, that Plaintiff could not support trover for the deeds. *Phillips v. Robinson.* Page 106
2. In trover for a packet of letters, the Defendant was allowed to stay proceedings as to one of them, upon delivering it up and paying costs. *Earle v. Holder-ness.* 462
3. *E.* being indebted to Plaintiffs, agreed to deposit with Plaintiffs, as agent to *P.*, a bill of exchange, as security for a sum advanced by

USURY.

by P.; and having deposited the bill with Plaintiffs, wrote to them as follows:—"The bill you will hold, subject to P.'s advance; and also for any advances or expences you have against me." The bill having been, at the instance of the acceptor, surreptitiously taken by the Defendant: Held, that the Plaintiffs might sue, and recover against him in trover, although P. had previously sued him, and had recovered by the award of an arbitrator the amount of his advance. *Knight and Another, v. Legh.*

Page 589

4. A sheriff who takes in execution the goods of a bankrupt, is liable in trover to his assignees, although he has no notice of the bankruptcy, and a commission has not been sued out at the time of the execution: *Price and Another, Assignees of Latham, Bankrupt, v. Helyar.* 597

USE AND OCCUPATION.

See LANDLORD AND TENANT, 9.

USURY.

- A. having a bill for 2500*l.* at two months' date, which he could not readily negotiate in London, requested B. to give him in exchange an acceptance of B.'s London banker at the same date, and for the same sum:

VENDOR, &c. 733

B. did so, deducting 16*l.* 10*s.* for commission:

Held, no usury: *Stowell and Another v. Eads.* Page 81

VARIANCE.

See PLEADING, 5, 6, 14, 15.
VENDOR AND PURCHASER, 2.

VENDOR AND PURCHASER.

See FRAUDS, STATUTE OF, 3.

1. Defendant having offered to purchase a house, and to give Plaintiff six weeks for a definitive answer:

Held, that before the offer was accepted, the Defendant might retract it at any time during the six weeks.

2. Averment, that Plaintiff was entitled to a term of thirty-two years in the premises, under a contract with A., and that Plaintiff having agreed to take the premises, Defendant was ready to grant him a lease of thirty-one years:

Plaintiff having only twelve years' term in the premises, and shewing no written contract with A. for a term of thirty-two years:

Held, a material variance.

3. Defendant offered to purchase a house upon certain terms, "possession to be given on or before 25th July;" Plaintiff agreed to the terms, and said he would

would give possession on the 1st of August :

Held, no acceptance of Defendant's offer. *Routledge v. Grant.* Page 653

VENUE.

See PLEADING, 1, 2.

VIRTUTE CUJUS.

See EXECUTION, 2.

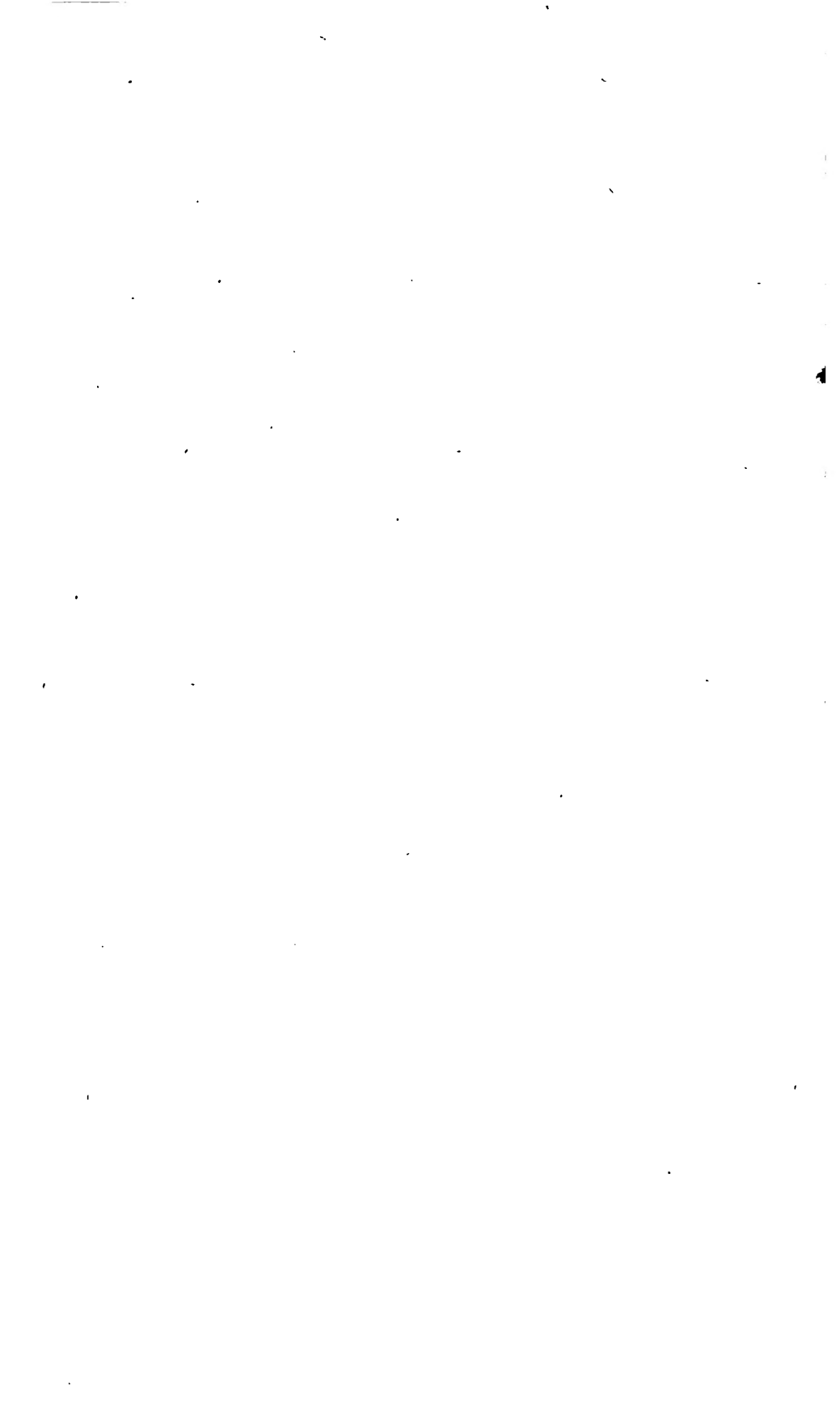
WARRANT OF ATTORNEY (Judgment on).

Defendant being indebted to Plaintiff, gave him a bill of exchange in 1823 for 2500*l.*, and a warrant of attorney to secure the payment.

In 1825, by a deed, reciting that he was indebted to the Plaintiff 5000*l.*, he gave a mortgage to secure that sum, and any advances to the extent of 10,000*l.* In 1826 the estate so mortgaged was sold for 3600*l.*, and the proceeds paid to the Plaintiff. After this an account was stated between Plaintiff and Defendant, in which the bill of exchange was mentioned, among other claims, as an existing debt, and other property was mortgaged to Plaintiff by way of security, which he was not to sell without six months' notice to Defendant; the bill of exchange was not mentioned in the recital of the second mortgage deed.

Plaintiff having after this issued execution on the warrant of attorney, the Court refused to set it aside. *Stoveld and Another v. Eade.* Page 154

END OF VOL. IV.





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